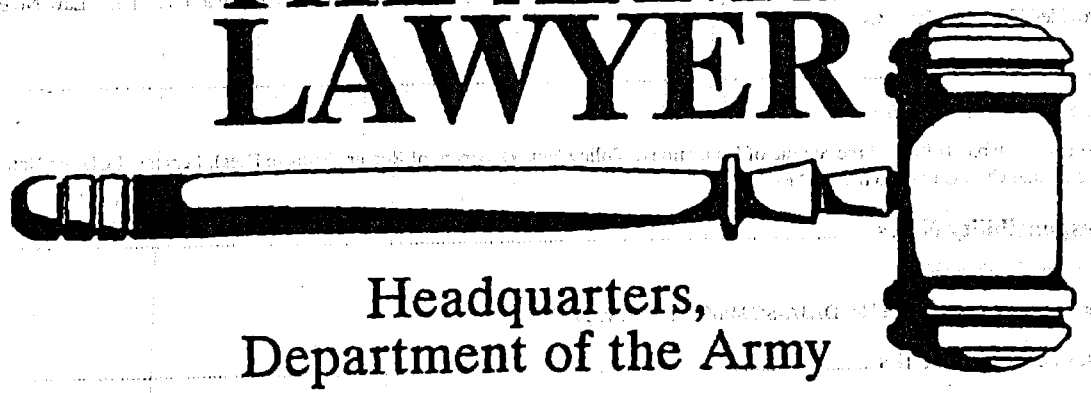
THE ARMY LAWYER



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Contract Offloading Under the Economy Act

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Introduction

"We're not talking about an occasional slipup here. We're looking at a government-wide, systematic end run around the procurement rules."[1]

With this statement, Senator Carl Levin indicted the Department of Defense's (DOD) use of the Economy Act of 1932 (Economy Act or Act),[2] an often misunderstood statute designed to promote efficiency in government procurement. The Economy Act authorizes federal agencies to order goods and services from other federal agencies when an agency determines that it is in the best interest of the government to do so and the ordered goods or services cannot be provided "as conveniently or cheaply" by private industry.[3] Significantly, agencies placing an Economy Act order with another agency are exempt from the normal requirement to obtain full and open competition.[4] Over the past several years, the DOD has used the Economy Act extensively to order goods and services using other agencies' contracts, a practice known as "offloading."[5] Although precise amounts are unknown, the DOD offloaded as much as $3 billion per year from 1990 to 1992.[6]

Because of persistent abuses of the DOD's authority under the Economy Act, Congress recently directed the DOD to rewrite its regulations implementing the Act.[7] In response, the DOD has substantially restricted offloading under the Economy Act. This article explores the history and purpose of the Economy Act, discusses current statutory provisions, examines the DOD's use of the Economy Act to offload requirements, and reviews changes in the DOD policy in response to recent congressional direction.

History and Purpose

Prior to the Economy Act, federal agencies had no general authority to order goods or services from another agency.[8] Agencies were prohibited from undertaking work for other agencies if it involved increasing their personnel or facilities, and they were prohibited from receiving reimbursement for the pay of personnel performing the work for another agency.[9] As the Great Depression took hold and the nation was confronted with "industrial stagnation, unemployment, a period of low commodity prices, and dwindling, if not disappearing, national income," Congress sought ways to curtail the expenses of the federal government.[10] Congress seized on the Economy Act as a method of realizing substantial economies in the government by deleting "duplicating and overlapping activities."[11] The legislative history reflects Congress's belief that private industry should not be called on to perform "what government agencies can do more cheaply for each other," and that government agencies "especially equipped to perform the work" should be available whenever work can be performed "as expeditiously and for less money" than elsewhere.[12] Congress also recognized that it would be unfair to the agency

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[1] Senator Carl Levin, *quoted in Report: Agencies' Contracting Practices Dodged Federal Law*, DAILY PROGRESS, Jan. 27, 1994, at A1, A6.

[2] 31 U.S.C. § 1535 (1988).

[3] *Id.*

[4] 10 U.S.C.A. § 2304(c)(5) (West Supp. 1994) (allowing agencies to use "other than competitive procedures" when a statute expressly authorizes the procurement from another agency); National Gateway Telecom, Inc. v. Aldridge, 701 F. Supp. 1104 (D.N.J. 1988); Liebert Corp., B-232234.5, 70 Comp. Gen. 449, 91-1 CPD ¶ 413 (1991).

[5] *See Off-Loading: The Abuse of Interagency Contracting to Avoid Competition and Oversight Requirements*, Gov't Cont. Rep. (CCH) ¶ 99,761 (Feb. 18, 1994).

[6] *Id. See also* OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, AUDIT REPORT NO. 93-042, ALLEGATIONS OF IMPROPRIETIES INVOLVING DOD ACQUISITIONS OF SERVICES THROUGH THE DEPARTMENT OF ENERGY (Jan. 21, 1993) [hereinafter DODIG REPORT 93-042].

[7] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 844, 107 Stat. 1547, 1720-21 (1993).

[8] *See* In the Matter of Washington Nat'l Airport; Federal Aviation Admin.; Intra-agency Reimbursements Under 31 U.S.C. § 686 (1970), B-136318, 57 Comp. Gen. 674 (1978).

[9] To the Secretary of Interior, A-22581, 7 Comp. Gen. 709 (1928) (reimbursement would have the effect of augmenting appropriation). *See also* 31 U.S.C. § 1301 ("Purpose Statute"); 31 U.S.C. § 3302(b) ("Miscellaneous Receipts Statute").

[10] H.R. REP. NO. 1126, 72d Cong., 1st Sess. 1 (1932).

[11] *Id.* at 15.

[12] *Id.* at 16.

performing the work to shoulder the cost of performance, and thus decided that the "entire cost" must be paid by the agency ordering the goods or services.[13]

Congress passed the Economy Act in 1932 as an amendment to section 7 of the Fortification Act of 1920.[14] As originally written, the Economy Act authorized the head of any "executive department," "independent establishment of the government," "bureau," or "office," to place orders with another agency, if funds were available and if the order was in the "interest of the government."[15] The Act required the ordering agency to pay the actual cost of the goods or services provided and authorized advance payment to the performing agency. Significantly, the Act did not authorize contract offloading; orders were permitted only to agencies "in a position to supply or equipped to render" the requested goods or services.[16] The Act also contained an important proviso—that if the required goods or services "can be as conveniently or more cheaply performed by private agencies such work shall be let by competitive bids to such private agencies."[17] Further, the Act provided that an order to another agency "shall be considered as obligations upon appropriations in the same manner as orders or contracts placed with private contractors."[18]

The practice of offloading began in 1942. Congress amended the Economy Act to authorize the Departments of War, Navy, Treasury, and several other agencies to order goods and services from an agency in a position to supply, render, or "obtain by contract" the requested goods or services.[19] Congress subsequently made offloading available to all agencies in 1982.[20] Congress believed that removal of the restriction on offloading would allow the "maximum utilization by the Government of valuable expertise" developed by the various agencies, thus promoting efficiency in government procurement.[21] To prevent agencies from using this authorization to circumvent funding restrictions or limitations, Congress added a new requirement that any condition or limitation applicable to an ordering agency's amounts for procurement "applies to the placing of the order or the making of the contract."[22]

Congress also amended the Economy Act in 1950 to provide that no funds used pursuant to the Act "shall be available for any period beyond that provided by the Act appropriating such funds."[23] By this amendment, Congress intended to restrict agencies' use of the Economy Act as a vehicle to continue the life of appropriated funds beyond their period of availability.[24] No longer could orders be considered as obligations in the same manner as contracts placed with private firms. Rather, the ordering agency must not only use current funds when ordering under the Act, but the performing agency also must use current funds when filling the order.[25]

Current Statutory Provisions

As currently codified,[26] §1535(a) of the Economy Act provides:

> the head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if:
>
> (1) amounts are available;
>
> (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;

[13] *Id.*

[14] Act of May 21, 1920, ch. 194, § 7(a), 41 Stat. 613.

[15] Economy Act of 1932, ch. 314, § 601, 47 Stat. 417.

[16] *See* To the Acting Secretary of the Navy, B-7071, 19 Comp. Gen. 544 (1939) (holding that Economy Act does not authorize the transfer of funds from one agency to another for the purpose of performing the work by contract).

[17] Economy Act of 1932, ch. 314, § 601, 47 Stat. 417.

[18] *Id.*

[19] Pub. L. No. 77-670, ch. 507, 56 Stat. 661 (1942).

[20] Act of October 15, 1982, Pub. L. No. 97-332, 96 Stat. 1622.

[21] H.R. REP. No. 456, 97th Cong., 2d Sess. 1, 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3182, 3185.

[22] Act of October 15, 1982, Pub. L. No. 97-332, 96 Stat. 1622 (codified at 31 U.S.C.A. § 1535(c) (West Supp. 1994)). *See also* H.R. REP. No. 456, 97th Cong., 2d Sess. 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3187.

[23] Act of September 6, 1950, Pub. L. No. 81-759, ch. 896, § 1210, 64 Stat. 765.

[24] H.R. REP. No. 1797, 81st Cong., 2d Sess. 9 (1950).

[25] To the Secretary of Agriculture, B-104354, 31 Comp. Gen. 83 (1950).

[26] 31 U.S.C. § 1535(a) (1988).

(3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and

(4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

What Is an Agency?

A question often arises within the DOD as to what constitutes an "agency" under the Economy Act. A review of the legislative history demonstrates that Congress considers the military departments, as well as the DOD, as "agencies" for Economy Act purposes. For clarity, the codified version of the Economy Act substitutes the word "agency" for "executive department or independent establishment of the Government," and the words "major organizational unit" for "bureau or office."[27] Although the Economy Act does not further define "agency," 31 U.S.C. §101 defines "agency" to include a "department, agency, or instrumentality of the United States."[28] Prior to amending the Economy Act in 1982 to permit offloading by all federal agencies, Congress recognized the DOD and the military departments as distinct agencies in subsection (b) of the Act, which authorized "the Secretary of Defense, the Secretary of a military department of the Department of Defense," and several other agencies to order goods and services from other agencies which could obtain the items "by contract."[29] Congress deleted subsection (b) in 1984 when making technical amendments to the codified version of the Act, because subsection (b) no longer was necessary after Congress made offloading universally available in 1982. Nevertheless, Congress did not intend to make any substantive change to the law.[30]

Additionally, the Armed Services Procurement Act defines "head of an agency" to include the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force.[31] Likewise, the *Federal Acquisition Regulation* (*FAR*), which implements the Economy Act, defines executive agencies to include military departments.[32] Significantly, the military departments receive separate appropriations[33] and Congress prohibits the transfer of funds between appropriations unless authorized by law.[34] The Comptroller General has held that the military departments have no general authority independent of the Economy Act to transfer funds; thus, military interdepartmental purchase requests (MIPRs) are issued pursuant to the Economy Act.[35] For these reasons, the Economy Act governs reimbursable orders from one military department to another, as well as orders from a military department or other DOD agency to a non-DOD agency.[36] Each military department is an "agency" within the meaning of the Economy Act. However, nonappropriated fund activities do not constitute "agencies" within the meaning of the Economy Act.[37]

Who Decides to Place the Order?

The statute simply provides that the "head of an agency" may place an Economy Act order. Furthermore, the agency head must decide that the order is in the best interest of the United States and that the ordered goods and services cannot be provided as conveniently or cheaply by commercial enter-

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[27] *See* H.R. REP. No. 651, 97th Cong., 2d Sess. 79 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 1973.

[28] 31 U.S.C. § 101 (1988).

[29] 31 U.S.C.A. § 1535 (West 1983).

[30] Pub. L. No. 98-216, 98 Stat. 3 (1984). The opening statement of the act described it as an act to codify "without substantive change recent laws related to money and finance and transportation and to improve the United States Code."

[31] U.S.C.A. § 2302 (West Supp. 1994).

[32] GENERAL SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. 2.101 (Apr. 1, 1984) [hereinafter FAR]. *See also* DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 202.101 (Dec. 31, 1991) [hereinafter DFARS].

[33] *See, e.g.*, Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, 108 Stat. ___ (1994).

[34] *See* 31 U.S.C.A. § 1532 (West 1983) (providing that amounts available in an appropriation may be withdrawn and credited to another appropriation only when authorized by law).

[35] Obligation of Funds Under Military Interdepartmental Procurement Requests, B-196404, 59 Comp. Gen. 563 (1980) (rejecting argument that 10 U.S.C. §§ 2308 and 2309 provide an independent basis for military departments to enter reimbursable agreements).

[36] *See* DEP'T OF ARMY, REG. 37-1, ARMY ACCOUNTING AND FUND CONTROL, glossary, sec. II, Terms (30 Apr. 1991) [hereinafter AR 37-1] (defining Economy Act orders as orders issued to other governmental agencies, "including orders for work or services to be performed by components of the Department of Defense"). A plausible argument exists that the Economy Act does not apply to intra-DOD, direct citation orders, to the extent that the performing department does not augment its appropriation, but merely acts as a "conduit" for the ordering department's funds. *See* 10 U.S.C.A. § 2309(a) (West 1983) (providing that appropriations available to DOD, the military departments, the Coast Guard, and the National Aeronautics and Space Administration may be made available "through administrative allotment" for obligation for procurement by another agency "without transfer of funds on the books of the Department of the Treasury"). Within the Army, direct fund cite orders are preferred over reimbursable orders. *See* AR 37-1, *supra*, para. 12-7b.

[37] Department of Agriculture Graduate Sch.—Interagency Orders for Training, B-214810, 64 Comp. Gen. 110 (1984).

prise.[38] The *FAR* provides that the agency head "or designee" may determine that an Economy Act order is in the government's interest.

The Secretary of the Army is the head of the Department of the Army.[39] Until recently, the agency head designee within the DOD for Economy Act determinations was the contracting officer. A recent amendment to the *Defense Federal Acquisition Regulation Supplement* (*DFARS*) eliminated this designation, relegating the contracting officer to an "advisory role" within the DOD.[40] Nevertheless, Army regulation still provides that, for Economy Act orders requiring contract action outside the local contracting office, the contracting officer must "ensure enforcement of the FAR and DFARS" by preparing a written determination "on the MIPR" as to whether the order is in the best interest of the government, including the expected economies or other advantages to be achieved by the order.[41] Additionally, the ordering activity must coordinate the order with legal counsel.[42]

As discussed below, the Secretary of Defense (SECDEF) recently placed additional determination requirements on all DOD activities ordering goods or services from non-DOD agencies.[43]

Best Interest Determination

The Economy Act stipulates that agencies may place orders if the head of the ordering agency decides the order is in "the best interest of the United States Government."[44] The Act thus contemplates a reasoned determination by the agency head prior to placing the order. Unfortunately, the *FAR* provides very little guidance about what factors an agency head should consider in making a "best interest" determination. *FAR* 17.502 states that an agency may place orders with any other agency if the agency head, or designee, determines that it is "in the Government's interest to do so." The determination must include a finding that legal authority for the order "otherwise exists," and that the order does not conflict with "any other agency's authority or responsibility."[45] Further, the agency head must find that the acquisition conforms to the requirements of *FAR* subpart 7.3 if the order involves the use of a commercial activity operated by the performing agency.[46] Aside from the above, the *FAR* does nothing to aid in the determination process; it fails even to mention the requirement that the performing agency provide the goods or services as "conveniently or cheaply" as private industry.

The statutory language indicates that the agency head should consider not just the best interest of the ordering agency, but the best interest of the "United States Government." This implies that the agency head should be concerned with how the government as a whole will benefit from the proposed transaction. Considering the purpose of the Economy Act and its legislative history, an agency head should consider whether the performing activity has the requisite expertise to enter and administer a contract for the required goods or services. Additionally, an agency head should consider whether the performing agency will comply with statutory requirements for competition.[47] Finally, as discussed below, the agency head should consider whether the performing agency will obtain the best deal for the government (*i.e.*, whether the performing agency will deliver the requested supplies or services as cheaply as commercial industry).

As Conveniently or Cheaply?

As originally enacted, the Economy Act required agencies to obtain competitive bids by private firms if the goods or services could be provided by private industry "as conveniently or more cheaply" than another federal agency.[48] As written, agencies were precluded from ordering from another agency at a cost in excess of performance by private industry. Congress viewed the Economy Act as a method of saving money

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[38] FAR 17.502.

[39] 10 U.S.C.A. § 3013(a)(1) (West Supp. 1994).

[40] *See* 59 Fed. Reg. 22,759 (1994) (effective April 25, 1994, amending *DFARS* 217.502, and providing that the contracting officer who normally would contract the requesting activity should advise in the determination process "if requested").

[41] AR 37-1, *supra* note 36, para. 12-5r(4)(a) (C19, 24 May 1993).

[42] *Id.*

[43] *See infra* note 105 and accompanying text.

[44] 31 U.S.C. § 1535(a)(2) (1988).

[45] FAR 17.503(a). For example, the Administrator of General Services is authorized to provide for the purchase, lease, and maintenance of automatic data processing equipment by federal agencies. *See* 40 U.S.C. § 759 (1988).

[46] FAR 17.503(b). *Federal Acquisition Regulation* subpart 7.3 implements OMB Circular No. A-76, which prescribes a general policy of relying on private commercial sources for supplies and services after conducting a cost comparison between government and contractor performance.

[47] *See* 10 U.S.C.A. § 2304(f)(5)(B) (West Supp. 1994) (prohibiting an agency head from procuring goods or services from an agency which does not comply with competition requirements when providing the goods or services). *But cf.* National Gateway Telecom, Inc. v. Aldridge, 701 F. Supp. 1104 (D.N.J. 1988) (holding that a contractor has standing to challenge agency's decision to issue Economy Act order, but lacks standing to challenge performing agency's contract as a violation of CICA).

[48] Economy Act of 1932, ch. 314, § 601, 47 Stat. 417.

for the government. The legislative history reflects Congress's belief that private industry should not perform what government agencies "can do more cheaply for each other."[49] A committee report noted, for example, that the Departments of Treasury, Justice, and Interior should be able to have their vessels repaired in government navy yards whenever the Navy Department could perform the work "*as expeditiously and for less money* than the materials and services will cost elsewhere."[50]

The Comptroller General has consistently supported this position. Thus, in *To the Governor of the Farm Credit Administration*,[51] the Comptroller held that the Economy Act did not authorize the use of Naval aircraft unless the ordering agency showed that it would cost less than commercial transportation. In *Washington National Airport; Federal Aviation Administration; Intra-agency Reimbursements Under 31 U.S.C. 686 (1970)*,[52] the Comptroller General reviewed the legislative history of the Economy Act and concluded that Congress intended to have work performed at the least cost to the government. To accomplish this goal, agencies must first compute the additional costs to the performing agency in providing the goods or services. An agency should issue an order only if the performing agency's additional costs are equal to or less than the cost of the work or service performed by a private source.[53]

When Congress recodified the Economy Act in 31 U.S.C. § 1535 in 1982, Congress inexplicably changed the language of the Act in a minute, yet significant detail. Rather than requiring the head of the ordering agency to contract with commercial industry if it could perform as conveniently or cheaply as another federal agency, the codified version provides that the head of the agency may place an order with another agency if the head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by commercial sources.[54] This inversion of the original statutory language implies that the agency head may order from another agency if the agency head determines it to be *either* as cheap *or* as convenient as performance by private industry. Nothing in the legislative history suggests that Congress intended to change the meaning of the original provision.[55] Nevertheless, the literal language implies that an agency head may issue an Economy Act order to another agency if he finds only that the goods or services cannot be provided "as conveniently" by private industry, regardless of whether the goods or services can be provided "as cheaply."

The Comptroller General has not specifically addressed this issue since the Economy Act was recodified in 1982. However, recently the Comptroller implicitly recognized that cost is a factor in determining the propriety of an Economy Act order. In *Dictaphone Corp.*,[56] the Air Force had a requirements contract for forty dictation systems with Sudsbury Systems. The Navy issued an Economy Act order to the Air Force for one dictation system, which the Air Force proposed to provide by issuing a delivery order to Sudsbury. Dictaphone protested the transaction, arguing that the Navy lacked a reasonable basis to determine whether it was obtaining a dictation system "more cheaply" than Dictaphone could provide. The Comptroller denied the protest, finding that the Navy reasonably concluded that it could not obtain the system "more cheaply or conveniently" than through the Air Force contract because the contract price was cheaper than the Federal Supply Schedule price.[57] Interestingly, the Comptroller did not distinguish between the "convenience" determination and the "as cheaply" determination, and did not base the decision on any "convenience to the government" rationale. It seems clear that, consistent with the legislative history and his prior holdings, the Comptroller will continue to require agencies to demonstrate that goods ordered under the Economy Act are cheaper than those which could be provided directly by commercial enterprise.[58]

When considering whether a performing agency can provide the goods or services "as cheaply" as commercial enterprise, one should consider the interplay between the Competition in Contracting Act (CICA)[59] and the Economy Act. Generally, performing agencies must comply with the

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[49] H.R. REP. No. 1126, 72d Cong., 1st Sess. 16 (1932).

[50] *Id.* (emphasis added).

[51] A-51969, 13 Comp. Gen. 150 (1933).

[52] B-136318, 57 Comp. Gen. 674 (1978).

[53] *Id.*

[54] 31 U.S.C. § 1535(a)(4) (1988).

[55] *See* H.R. REP. No. 651, 97th Cong., 2d Sess. 79 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1973 (describing all changes to section (a)(4) as "for clarity" and all deleted provisions as "surplus").

[56] B-244691, Nov. 25, 1992, 92-2 CPD ¶ 380.

[57] *See FAR* subpt. 8.4. Supply schedule prices normally are based on volume discounts.

[58] *See also* Liebert Corp., B-232234.5, 70 Comp. Gen 449, 91-1 CPD ¶ 413 (1991) (holding that ordering agency reasonably determined that offload was likely to be "cheaper and more convenient" that a separate agreement); National Gateway Telecom, Inc. v. Aldridge, 701 F. Supp. 1104 (D.N.J. 1988) (holding that ordering agency reasonably concluded that performing agency's total cost would be less than cost of contracting directly with commercial sources).

[59] 10 U.S.C. §§ 2301-2306 (1988).

mation processing (FIP) equipment and services from the General Services Administration without relying on the Economy Act.[86]

DOD Inspector General Investigations

Congress intended the Economy Act to provide agencies with an economical and efficient method of utilizing the expertise of other agencies. Because of the relative ease of placing an Economy Act order with another agency rather than obtaining the goods or services competitively, agencies eventually came to see the Economy Act as a quick method of offloading numerous, routine requirements to other agencies, especially with year-end funds. In a series of investigations culminating in the issuance of nine separate reports, the DOD Inspector General (DODIG) found that DOD activities had abused Economy Act procedures by issuing orders to the Tennessee Valley Authority (TVA), the Department of Energy (DOE), the Library of Congress, and other agencies.[87]

In one report summarizing DOD Economy Act orders to the TVA from May 1990, to February 1992, the DODIG found that DOD activities issued more than 221 Economy Act orders, valued at $139 million, to the TVA Technology Brokering Program (program) to procure support services and various equipment items.[88] The TVA had established the program in 1988 to expand opportunities for technology-based growth in the Tennessee Valley. The program filled Economy Act orders through cooperative agreements and contracts with private firms inside and outside the Tennessee Valley. The TVA took the position that its cooperative agreements were not subject to the CICA or the *FAR*.[89] Additionally, the TVA assessed a fee ranging from five to ten percent of the amount of each order to process and administer the procurement. The DODIG found that the program permitted agencies to designate the "cooperator" to provide the requested goods or services under the Economy Act order, thus avoiding competition. Many of the "cooperators" selected by the DOD had performed contract work for the DOD previously. The DODIG further found that DOD activities used the program to offload numerous routine requirements at the end of the fiscal year, using expiring funds. For example, the Air Force at Hurlburt Field, Florida, issued ten orders to the TVA in September, 1991, to obtain goods and services such as a gas utility vehicle, walkie-talkies, design of a machine gun range, and the clearing of trees and underbrush.[90]

The DODIG also determined that DOD activities used the TVA to acquire millions of dollars worth of FIP hardware, software, maintenance, and support services without obtaining a delegation of procurement authority from the General Services Administration, as required by the Brooks Act.[91] The DOD also improperly issued project orders, rather than Economy Act orders, to the TVA for offloading to "cooperators."[92] In numerous instances, DOD activities paid more than the actual costs of the goods and services when ordering from the TVA. The TVA assessed a fee, ranging from five to ten percent of each order, to process and administer the procurements, yet had never performed an analysis to relate the actual costs of the program to the fees charged. Of the 143 Economy Act orders reviewed by the DODIG, DOD activities paid fees of $7.4 million to the TVA. Moreover, many of the cooperators subcontracted out over ninety percent of the work, while still charging a fee for contract administration and program management. The TVA also required DOD activities to make advance payments, then deposited the funds in an interest-bearing checking account.[93] The TVA earned an estimated $3.5 million in interest on the DOD's funds, while the United States Treasury incurred about $4.6 million in interest expense during the same period to borrow the funds. Finally, and perhaps most telling, DOD activities failed to obtain the required determinations of the agency head or the agency head's designee prior to issuing most Economy Act orders to the TVA.

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[86] 40 U.S.C. § 759 (1988); Interagency Agreement—Admin. Office of U.S. Courts, B-186535, 55 Comp. Gen. 1497 (1976).

[87] *See, e.g.*, DODIG REPORT 93-042, *supra* note 6; OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, AUDIT REPORT NO. 93-068, PROCUREMENT OF SERVICES FOR THE NON-ACOUSTIC ANTI-SUBMARINE WARFARE PROGRAM THROUGH THE TENNESSEE VALLEY AUTHORITY (Mar. 18, 1993) [hereinafter DODIG REPORT 93-068].

[88] *See* OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, AUDIT REPORT NO. 94-008, DOD PROCUREMENTS THROUGH THE TENNESSEE VALLEY AUTHORITY TECHNOLOGY BROKERING PROGRAM (Oct. 20, 1993).

[89] The TVA based its position on the Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-6308 (1988). The act permits agencies to use cooperative agreements to transfer a thing of value to a recipient to carry out a public purpose of support or simulation authorized by law, when substantial involvement is expected between the agency and the recipient.

[90] OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, AUDIT REPORT NO. 92-069, QUICK REACTION REPORT ON DOD PROCUREMENTS THROUGH THE TENNESSEE VALLEY AUTHORITY (Apr. 3, 1992).

[91] *See* 40 U.S.C. § 759 (1988) (Brooks Act); Amdahl Corp., GSBCA No. 7859-P, 85-2 BCA ¶ 18,111 (Brooks Act preempts Economy Act for purchases of FIP resources).

[92] *See* DODI 7220.1, *supra* note 84, para. VI.A.7 (government-owned-government-operated facility must be substantially in a position to meet the project order requirements; only incidental subcontracting permissible).

[93] The Economy Act permits performing agencies to require advance payments. *See* 31 U.S.C.A. § 1535(b) (West Supp. 1994). Some agencies, such as the Library of Congress and the Government Printing Office, typically require the DOD to make advance payments. *See* DEP'T OF AIR FORCE, AIR FORCE REG. 172-1, para. 7-25c (15 Oct. 1990). When contracting directly with commercial sources, an agency head or designee must make specific determinations and findings prior to making advance payment; advance payment is considered the "least favored method of financing." FAR 32.402.

In one especially egregious example, the Non-Acoustic Anti-Submarine Warfare (NAASW) program issued over $18 million in Economy Act orders to the TVA between April 1991, and March 1992.[94] Of the seven orders issued, none were reviewed by a contracting officer. The NAASW program requested, and the TVA approved, the designation of ESG Incorporated (ESG) as the primary contractor. ESG subcontracted the technical work requirements that accounted for ninety-six percent of the costs billed by ESG. The DODIG found that the NAASW program incurred as much as $1.5 million in additional costs by issuing the Economy Act order to the TVA rather than contracting directly for the requirement, including a $1.1 million brokering fee to the TVA and $450,000 in management costs to ESG. Additionally, the TVA management personnel were unable to administer the contract properly because they lacked security clearances.

The DODIG found similar abuses in the DOD's orders to the DOE's Work-for-Others Program (WFOP) at Oak Ridge, Tennessee.[95] The WFOP provides other federal agencies access to the special research capabilities and resources of the DOE's national laboratories. From May 1990 through October 1991, the DOD activities ordered about $324 million worth of goods and services through the Oak Ridge office. The DODIG determined that DOD activities paid over $11 million in additional costs to obtain services through the DOE, due in large part to multiple tiers of subcontractors. Moreover, most of the worked performed or contracted out by the DOE did not require the unique capabilities of the DOE. Of the 196 orders reviewed by the DODIG, a contracting officer had reviewed only seven.

Congress Responds

Congress expressed concern more than five years ago about the DOD's use of the Economy Act to avoid contracting laws and regulations. In September 1989, the Senate Governmental Affairs Committee held hearings to review the DOD's offloading of contract requirements to the Library of Congress.[96] As the DODIG began to uncover more abuses involving orders to the TVA and the DOE, the DOD and the military departments issued policy memoranda and messages restricting use of Economy Act orders outside of the DOD.[97] Despite these warnings, Economy Act abuses continued.[98]

The Senate Subcommittee on Oversight of Government Management began investigating the DOD's use of the Economy Act in May 1992, and held hearings in 1993. During the hearings, Mr. Derek J. Vander Schaff, DOD Deputy IG, recommended that the Economy Act be changed to require a determination that the goods could not be acquired "as conveniently *and* cheaply" from private sources, and to require that agencies offload only to an agency that normally obtains those services in the course of doing its basic functions.[99] At the conclusion of the hearings, Senator Carl Levin pledged to end the "massive, egregious problem" of contract offloading which totals "hundreds of millions of dollars every year."[100]

Congress subsequently passed legislation requiring the DOD to prescribe regulations requiring a DOD contracting officer, or another official designated by regulation, to approve in advance all Economy Act offloads to non-DOD agencies.[101] Additionally, the new regulations were required to limit offloads to situations where: the performing agency already is buying similar goods or services by contract; the performing agency is better qualified to administer the contract because of its unique capabilities or expertise; *or* the performing agency is specifically authorized by law to purchase the required goods or services on behalf of other agencies.[102] Congress also required the new regulations to prohibit offloads to agencies not covered by 10 U.S.C. chapter 137, the Federal Property and Administrative Services Act of 1949, or the *FAR*, absent Senior Acquisition Executive approval.[103] Finally, Congress required new regulations prohibiting the

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[94] *See* DODIG REPORT 93-068, *supra* note 87.

[95] *See* DODIG REPORT 93-042, *supra* note 6.

[96] *See Offloading: The Abuse of Interagency Contracting to Avoid Competition and Oversight Requirements*, Gov't Contract Reports (CCH) ¶ 99,761 (Feb. 18, 1994); OFFICE OF THE INSPECTOR GENERAL, DEP'T OF DEFENSE, AUDIT REPORT NO. 90-034, CONTRACTING THROUGH INTERAGENCY AGREEMENTS WITH THE LIBRARY OF CONGRESS (Feb. 9, 1990).

[97] *See, e.g.*, Message, Headquarters, Dep't of the Army, SARD-PP, subject: Contract Offloading to Tennessee Valley Authority (TVA) (261100Z Dec 91) (requiring contracting officer approval and legal review of all MIPRs to non-DOD agencies); Memorandum, Under Secretary of Defense (Acquisition), to Secretaries of the Military Departments, subject: Contracting Through Interagency Agreements (25 Oct. 1991); Memorandum, Assistant Secretary of Defense, Prod. & Logistics, P/CPA, to Assistant Secretary of the Army (Research, Development, and Acquisition), subject: Contracting Through Interagency Agreements (10 May 1990).

[98] *See supra* note 88 and accompanying text.

[99] *See Subcommittee Investigates Economy Act Abuses in Contract "Off-Loading,"* 35 GOV'T CONTRACTOR ¶ 475 (Aug. 4, 1993).

[100] *See Levin Pledges Action to End Abuses of Interagency Purchases*, 60 FED. CONT. REP. (BNA) 94 (Aug. 2, 1993).

[101] National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 844, 107 Stat. 1574, 1720 (1993).

[102] *Id.*

[103] *Id.*

payment of a fee to the performing agency exceeding the actual or estimated costs of entering and administering the contract.[104]

Interestingly, Congress did not require the DOD to conduct a cost comparison between the proposed offload and competitive purchase from private industry before placing an Economy Act order. Apparently, Congress's main concern was to eliminate routine offloading for supplies and services to non-DOD agencies that lacked experience or expertise in providing the requested supplies or services, particularly when this offloading is done primarily to obtain quick obligation of expiring funds. Nevertheless, the relatively mild language of the statute gave the DOD sufficient flexibility to craft regulations permitting the effective use of the Economy Act to procure needed supplies and services.

The DOD Answers Congress

On February 8, 1994, the SECDEF issued a memorandum governing the DOD's offloading under the Economy Act.[105] The SECDEF memorandum provides that before an Economy Act order is placed outside the DOD for contracting action, the head of the ordering agency or designee must determine that:

> the ordered supplies or services cannot be provided as conveniently *and* cheaply by contracting directly with a private source; the servicing agency has unique expertise or ability not available within DOD; *and* the supplies or services clearly are within the scope of activities of the servicing agency *and* that agency normally contracts for those supplies or services for itself.[106]

The SECDEF memorandum permits the agency head to delegate the determination to a level no lower than Senior Executive Service (SES), Flag Officer, or General Officer of the ordering activity, so long as the servicing agency is required to comply with the *FAR*. If the ordering activity does not have an SES, Flag Officer, or General Officer, the commander of the activity may approve the determination. Nevertheless, if the servicing agency is not covered by 10 U.S.C. chapter 137 or title III of the Federal Property and Administrative Services Act of 1949, and is not required to comply with the *FAR*, the relevant Senior Procurement Executive must approve the determination.

The SECDEF memorandum also requires the DOD Comptroller to issue guidance requiring the "documented determination and finding approvals" be provided to accounting officers prior to committing funds on Economy Act orders. Further, the memorandum requires the Under Secretary of Defense for Acquisition and Technology (USD(A&T)) to amend DOD Instruction 4000.19 to incorporate the requirements of the memorandum, and to establish a tracking system for the number and dollars of offloads to non-DOD agencies. Additionally, the memorandum requires the USD(A&T) to modify the *DFARS* to define the role of the contracting officer in the approval process for Economy Act orders.

The DOD has responded quickly to the SECDEF memorandum. On April 21, 1994, the DOD Comptroller directed that DOD accounting officers are responsible for ensuring that a documented "determination and finding" statement is prepared prior to committing and obligating funds on Economy Act orders placed outside the DOD.[107] On April 25, 1994, *DFARS* 217.5 was amended to remove the contracting officer as the DOD designee for Economy Act orders.[108] The Assistant Secretary of the Army (Research, Development, and Acquisition) delegated authority, without power of redelegation, to approve determinations for offloads to non-DOD agencies to General Officer or SES commanders or directors of the ordering agency.[109] Then, on August 4, 1994, the Director for Procurement Policy, Department of the Army, ordered that Economy Act determinations "shall be prepared in Determination and Findings (D&F) format," and provided a sample Economy Act D&F.[110] The Director further ordered that all such D&Fs would be reviewed by counsel and coordinated with the requiring activity's supporting Army contracting office prior to execution.[111]

Have We Gone Too Far?

The SECDEF memorandum in response to Congress greatly exceeds the recent statutory requirements in regulating the DOD's offloads to non-DOD agencies. As written, the head

[104] *Id.*

[105] Memorandum, Secretary of Defense, to Secretaries of the Military Departments, subject: Use of Orders Under the Economy Act (8 Feb. 1994).

[106] *Id.* (emphasis added).

[107] Memorandum, DOD Comptroller, to Secretaries of the Military Departments, subject: Accounting Officer Responsibility for Economy Act Orders (21 Apr. 1994).

[108] *See supra* note 40 and accompanying text.

[109] Dep't of the Army Letter, Assistant Secretary (Research, Development & Acquisition), SARDA-94-6, subject: Delegation of Authority to Approve Determinations to Use the Economy Act (29 June 1994). *See also* DEP'T OF AIR FORCE, AIR FORCE FEDERAL ACQUISITION REG. SUPP. 5317.503-90(a) (1 Jan. 1992) [hereinafter AFFARS] (delegating Economy Act approval authority to a level no lower than SES/Flag/General Officer in the ordering activity's chain of command).

[110] Memorandum, Dep't of Army, U.S. Army Contracting Support Agency, SFRD-KP, subject: Acquisition Letter 94-5, Economy Act Orders outside DOD (4 Aug. 1994) [hereinafter AL 94-5]. *See also* AFFARS 5317.503-90 (Model Determination and Findings).

[111] AL 94-5, *supra* note 110.

of the ordering agency (or designee) must determine that the ordered supplies or services cannot be provided "as conveniently and cheaply" as by contracting directly with a private source. Thus, the ordering agency apparently must conduct some type of cost analysis or market survey, prior to issuing an Economy Act order, to ensure that the performing agency can provide the goods or services at the lowest price. Although beyond the requirements of the recent statute, this requirement is at least consistent with the intent of Congress when enacting the Economy Act, as well as Comptroller General decisions interpreting the act. As noted previously, this determination should include consideration of the competition obtained by the performing activity on the underlying contract.

As a second requirement, the SECDEF memorandum requires the performing agency to have "unique expertise or ability not available within DOD." This provision is obviously intended to prevent offloading to non-DOD agencies for common supplies or services that could readily be provided by competing the requirement. Like the requirement for determining if the order is "cheaper" than commercial sources, it is consistent with Congress's intent to permit offloads to tap into the expertise of other federal agencies.[112] Nevertheless, it places an additional burden on the ordering activity of determining what expertise is or is not available within other military departments and DOD agencies. More significantly, it precludes the DOD from ordering from a non-DOD activity at a cheaper price than private industry if the non-DOD activity lacks a "unique expertise."

The SECDEF memorandum also requires the ordering activity to determine that the supplies or services are "clearly within the scope of activities" of the servicing agency. The memorandum does not explain how the ordering agency is to determine the "scope of activities" of the servicing agency. Finally, the ordering agency must determine that the non-DOD servicing agency "normally" contracts for the supplies or services for itself. This language is broader than the recent statutory provision, which permitted ordering from a non-DOD agency under a contract entered before the receipt of the Economy Act order.[113] Significantly, this provision of the SECDEF memorandum is layered on top of the previous requirements. Thus, the SECDEF memorandum would prevent a DOD activity from ordering a product from a non-DOD agency that normally contracts for the product, at a cheaper price than commercial enterprise, if the non-DOD activity does not have a "unique expertise" not available within the DOD. Conversely, no matter how great the expertise of the performing agency or how much cheaper it can provide a product, the DOD may not order from that activity if the activity does not "normally" contract for the supplies. These severe restrictions, over and above those required by Congress, may greatly inhibit the DOD's ability to utilize offloading to economize procurement actions.

A Need for Guidance

The Senate hearings, the subsequent legislation, and the SECDEF memorandum all concern issuance of Economy Act orders outside the DOD. Left unaddressed is the issue of contract offloading *within* the DOD. The Economy Act applies to reimbursable orders within the DOD.[114] Nevertheless, much confusion remains about this issue within the DOD[115] and what it means for DOD activities' ability to order under the coordinated acquisition program.[116] The DOD should address the issue by amendment to the *DFARS*.

Further guidance also is needed concerning DOD agency "designees" for Economy Act determinations. When the DOD designee for Economy Act determinations was the contracting officer, DOD activities had a uniform determining official for all Economy Act transactions. The contracting officer was removed from this position in response to the SECDEF memorandum which raised the approval authority for non-DOD offloads to the General Officer/SES level. Unfortunately, this change created a vacuum in the *FAR/DFARS* assignment for intra-DOD Economy Act transactions, and for Economy Act transactions outside the DOD which will be performed by in-house assets. In the absence of additional guidance, Army activities should continue to follow *Army Regulation 37-1*, which requires the contracting officer to make written determinations as to whether the action is in the best interest of the government.[117] Although not expressly stated in the regulation, the contracting officer is apparently the Secretary of the Army's "designee" for making Economy Act determinations.

Similarly, DOD activities need guidance in making "best interest determinations" for intra-DOD offloads under the Economy Act. As the SECDEF memorandum addresses only offloading outside of the DOD, DOD activities need not require such restrictive determinations prior to offloading from one DOD activity to another. Nevertheless, the guidance at *FAR* 17.5 is of little use to the determining official. *Defense Federal Acquisition Regulation* 217.5 should be rewritten to

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[112] *See supra* note 21 and accompanying text.

[113] *See supra* note 101 and accompanying text.

[114] *See supra* notes 35, 36 and accompanying text.

[115] *See, e.g.*, Memorandum, Department of the Army, Office of Assistant Secretary, SARD-PP, to Assistant IG for Auditing, subject: Draft Audit Rep. on the Allegations of Improprieties Involving DOD Acquisition of Services Through the Department of Energy (5 Oct. 1992).

[116] *See* 10 U.S.C.A. § 2308 (West Supp. 1994); DFARS subpart 208.70. *See also supra* note 36.

[117] *See supra* note 41 and accompanying text.

provide guidance to the determining official on which factors should be considered in determining whether an intra-DOD transaction is in the best interest of the government.

Conclusion

The Economy Act provides the Army and, indeed, all federal agencies with an effective tool for obtaining needed goods or services in a timely manner. Contract offloading under the Economy Act promotes efficiency in government procurement by allowing agencies to tap into the technical expertise or management experience of other agencies. Further, it allows agencies to maximize the use of existing contracts, thus eliminating the need for costly, and time consuming, new procurement actions. It remains to be seen whether recent guidance by the DOD will curtail, or effectively eliminate, the use of the Economy Act to offload outside of the DOD.

The Agreement Relating to a United States Military Training Mission in Saudi Arabia: Extrapolated to Deployed Forces?

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Introduction

Although United States military personnel have served on a permanent basis in Saudi Arabia since World War II,[1] Saudi Arabia has no formal Status of Forces Agreement (SOFA) with the United States.[2] Deployed United States forces are technically exposed to Saudi Arabian law.[3]

This article suggests that, in the absence of a formal SOFA with Saudi Arabia, our deployed forces enjoy limited privileges and immunities extrapolated from an agreement governing the United States Military Training Mission in Saudi Arabia (USMTM Accords)[4] and as a matter of custom.[5] I derive the concept of extrapolation from Chief Justice Marshall's opinion in *The Schooner Exchange v. M'Faddon*.[6] Additionally, this article will provide historical background to show how the USMTM Accords apply to deployed United States forces and to complement the judge advocates' legal analysis of status of forces issues facing their commanders in Saudi Arabia.

[1] Jeffrey Schloesser, *The Limits of Power: America's 20 Years in the Gulf*, MIL. REV., Jan. 1992, at 21 ("The U. S. role in the gulf began in the 1930s, when U.S. business interests initially established the Arabian American Oil Company in Saudi Arabia. During World War II, the U.S. military shared British airfields in the area..."). *See also* Jeffrey Schloesser, U.S. Dep't of State, Special Report No. 166, U. S. Policy in the Persian Gulf (1987).

[2] Only specific international agreements govern the privileges and immunities of United States personnel serving in Saudi Arabia. Corps of Engineers personnel are governed by The Agreement Relating to the Construction of Certain Military Facilities in Saudi Arabia, May 24-June 5, 1965, Exchange of Notes, 16 U.S.T. 890, T.I.A.S. No. 5830 [hereinafter COE Agreement]. The personnel of the Office of the Program Manager, Saudi Arabian National Guard (OPM-SANG), an Army Materiel Command organization, are governed by terms of Memorandum of Understanding Concerning the Saudi Arabian National Guard Modernization Program, Mar. 19, 1973, 24 U.S.T. 1106, T.I.A.S. No. 7634 [hereinafter OPM-SANG Agreement].

[3] BURDICK H. BRITTIN, INTERNATIONAL LAW FOR SEAGOING OFFICERS, 210 (5th ed. 1986) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." (quoting Wilson v. Girard, 354 U.S. 524, 529 (1957)). *See also* The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 143 (1812) ("[A]ll exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or express....").

[4] Agreement relating to a United States Military Training Mission in Saudi Arabia, Feb. 8-27, 1977, Exchange of Notes, 28 U.S.T. 2409, T.I.A.S. No. 8558 [hereinafter USMTM Accords]. The practice of the USMTM staff judge advocates is to call this agreement "The Accords." No historical basis for this terminology exists in the diplomatic record. The Chief, USMTM, as country representative for United States forces in Saudi Arabia, is the primary point of contact for United States military relations with the Saudi government.

[5] Wilson v. Girard, 354 U.S. 524 (1957). *See also The Schooner Exchange*, 11 U.S. at 116. Chief Justice Marshall addressed the rights of deployed troops in dicta, because the case applied to a maritime right of entry, not to a temporary passage of troops.

[6] *The Schooner Exchange*, 11 U.S. at 116, 143 ("that this consent may be implied. . . that when implied, its extent must be regulated by the nature of the case, and the views under which the parties. . . must be supposed to act."). Deployed forces share in the privileges and immunities of the USMTM. The USMTM operates the Main Post Exchange (PX) and Commissary on the Dhahran Airbase. The USMTM also operates a United States Postal Service outlet adjacent to the PX. The Chief, USMTM, the country representative for United States forces in Saudi Arabia, and executes *Army Regulation 27-50/SECNAVINST 5820.4E/AFR 110-12, Status of Forces Policies, Procedures and Information*. The Chief, USMTM also approves military country clearances.

Historical Antecedents

Current Events

The Southwest Asia Ceasefire Campaign began on 3 March 1991[7] and all combat forces associated with Desert Storm departed Saudi Arabia by July 1992.[8] In the Fall of 1991, the Saudi Arabian government invited the United States to deploy PATRIOT Task Forces to Saudi Arabia, under Operation Desert Falcon.[9] Over 3000 soldiers deploy to Saudi Arabia in support of Operation Desert Falcon, annually.[10] In July 1992, the wartime headquarters of the 22d Support Command (22d SUPCOM) which had evolved into the 1st Area Support Group (1st ASG), stood down[11] and the United States Army established its first postwar, command and control headquarters in Saudi Arabia: Army Forces Central Command-Saudi Arabia (ARCENT-SA).[12]

The Saudi Arabian government also hosts coalition forces as they enforce the United Nations "no fly-zone" operations in Southern Iraq.[13] The United States Air Force deploys its personnel to Saudi Arabia to support Operation Southern Watch.[14] In October 1994, the United States deployed additional forces to Saudi Arabia and Kuwait to counter a new Iraqi threat.[15]

For the purposes of this article, the term "deployed forces" includes personnel serving on PCS in command and control elements. The majority of deployed personnel serve on TDY or TCS. One of the constants of a tour of duty in the Arabian Gulf region is continual personnel turnover.

United States Military Relations with Saudi Arabia

The Middle East faced uncertainty after World War II. The British partitioned Palestine; the Saudi Arabian government perceived threats from its neighbors; and a new world order took shape in the Middle East.[16] The United States entered the fray by negotiating for an extension of its wartime presence at the Dhahran airbase.

The United States worked with the Saudi Arabian government to define mutually agreeable goals.[17] The Saudi Deputy Foreign Minister welcomed United States overtures for a military training mission: "You should think of Saudi Arabia as your own territory in elaborating your defense plans."[18] In 1948, the Joint Chiefs of Staff articulated United States requirements as follows:

> a. Adequate telecommunications facilities at Dhahran or nearby places.
>
> b. Airbase facilities in the Dhahran area sufficient
>
> (1) for the operational use of all types of modern military aircraft, and

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[7] OFFICE OF THE CHIEF OF STAFF, UNITED STATES ARMY, DESERT STORM STUDY PROJECT, CERTAIN VICTORY, 322 (1993) [hereinafter CERTAIN VICTORY] ("[O]n March 3 . . . Schwarzkopf announced that the Iraqis had accepted all of the cease-fire terms and . . . [t]he war was technically over.").

[8] *Id.* at 340.

[9] ARCENT-SA Command Briefing Materials, at 36 (Jan. 10, 1994) [hereinafter Command Brief]. The Commander, ARCENT-SA, designated the Army operation "Desert Falcon" in order to distinguish the PATRIOT mission from the Air Force mission in Operation Southern Watch. The Department of Defense designated the October 1994 deployment of forces as Operation Vigilant Warrior.

[10] These figures are based on the author's observation. Approximately three PATRIOT Task Forces (over 1000 soldiers per task force) will rotate through Saudi Arabia in a given year on TCS status. The numbers do not include personnel assigned to ARCENT-SA on permanent change of station (PCS) status or temporary change of station (TCS) surges such as Operation Vigilant Warrior.

[11] CERTAIN VICTORY, *supra* note 7, at 340.

[12] Command Brief, *supra* note 9, at 36. The ARCENT-SA is an Army level headquarters that consists of a full "G" Staff advised by an Army judge advocate. The staff also performs the mission of an Air Defense Artillery Brigade headquarters.

[13] DISPATCH, (United States Dep't of State, Bureau of Pub. Aff.), Aug. 31, 1992, at 682.

[14] *Id.* (quoting President Bush "[C]oalition aircraft, including those of the United States, will begin flying surveillance missions in southern Iraq . . . establishing a "no-fly zone."). The Air Force maintains the 4404th Composite Wing in Saudi Arabia. The Wing includes two Operational Groups (the 4409th and 4404th) each staffed with an Air Force judge advocate serving on a 90-day Temporary Duty (TDY) tour.

[15] *See* Julie Bird, *Back to the Gulf*, A.F. TIMES, Oct. 24, 1994, at 14.

[16] Telegram from the Minister in Saudi Arabia (J. Rives Childs) to the Secretary of State (Apr. 24, 1948), *in* 5 FOREIGN RELATIONS OF THE UNITED STATES 1948: THE NEAR EAST, SOUTH ASIA, AND AFRICA, PT. 1, 235 [hereinafter 5 FOREIGN RELATIONS 1948] (quoting King Ibn Saud "There are hostilities all around us. War may be with us very soon . . . [i]n the past, British have been my friends and have given me considerable assistance . . . now supporting Hashemites . . . British themselves will not harm me but Hashemite groups will.").

[17] *Id.* at 255. (Telegram from the Acting Secretary of State (Robert A. Lovett) to the Secretary of Defense (Forrestal)) ("the agreement . . . covering our rights at the Dhahran Airport expires on March 15, 1949. . . . It is the desire of this Department to have our Minister to Saudi Arabia, Mr. J. Rives Childs . . . as fully informed as possible.").

[18] *Id.* at 237 (quoting Shaikh Yusuf Yassin).

(2) for a United States training mission so expanded that it, in conjunction with Saudi Arabian nationals, can defend United States military installations in the Dhahran area.[19]

The Dhahran Air Base Agreement

The Dhahran Air Base (DAB) Agreement of 1951 extended United States military presence in Saudi Arabia.[20] The Saudi government extended the Dhahran Airfield Agreement which expired on 15 March 1949.[21] The 1948 negotiations articulated Saudi Arabia's strong interest in maintaining its sovereignty.[22] The negotiations surrounding this agreement set the tone for all future relations between United States military personnel and their Saudi hosts. United States Ambassador to Saudi Arabia Hare advised the State Department as follows: "*practical adjustment* rather than *rigid application* of the written word usually governs in such matters in this country."[23] The DAB Agreement entered into force on 18 June 1951.[24] The Saudi government also approved an Agreement for Mutual Defense Assistance.[25] This agreement laid the foundation for the creation of the United States Military Training Mission in 1953.

The Military Assistance Advisory Group to Saudi Arabia

The United States and Saudi Arabia implemented the 1951 Mutual Defense Assistance Agreement through the 1953 Military Assistance Advisory Group (MAAG) Agreement of 1953.[26] The MAAG Agreement had been delayed because of the turmoil of Palestinian Partition in 1948.[27] In 1949, the United States surveyed Saudi Arabia to determine eligibility for reimbursable military assistance which resulted in the MAAG Agreement.[28] In 1953, King Ibn Saud died.[29] Thus, amidst a backdrop of Middle East upheaval, a new era of United States-Saudi military cooperation was born.

The MAAG Agreement granted less jurisdiction to the MAAG commander than did the DAB Agreement.[30] Unlike the DAB Agreement, the MAAG Agreement limited United States jurisdiction over its military personnel to offenses com-

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[19] *Id.* at 245 (Memorandum by the Joint Chiefs of Staff to the Secretary of Defense (Aug. 10, 1948)).

[20] Agreement concerning the Air Base at Dhahran, Saudi Arabia, June 18, 1951, Exchange of Notes, 2 U.S.T. 1466, T.I.A.S. No. 2290 [hereinafter DAB Agreement].

[21] *Id.* at 1474.

[22] Telegram from the Minister in Saudi Arabia (Childs) to the Secretary of the State (Apr. 24, 1948), 5 FOREIGN RELATIONS 1948, *supra* note 16, at 236 (quoting King Ibn Saud, "My enemies in Islamic countries spread rumors I have even permitted Americans occupy holy places. If the Americans are really my friends . . . Americans must help me at least as the British are helping the Hashemites."). During this period, the Trucial States (now the United Arab Emirates) engaged Saudi Forces in a series of border skirmishes. The British provided training and equipment to the Trucial States.

[23] Telegram from the Ambassador in Saudi Arabia (Hare) to the Department of State (May 31, 1951), *in* 5 FOREIGN RELATIONS OF THE UNITED STATES, 1951: THE NEAR EAST AND AFRICA, at 1055 (emphasis added) [hereinafter 5 FOREIGN RELATIONS 1951]. This observation is the critical lesson for a United States commander to grasp: develop rapport with your Saudi hosts and do not rely on strict interpretation of the four corners of the agreement.

[24] DAB Agreement, *supra* note 20.

[25] Agreement Relating to the Extending of Procurement Assistance to Saudi Arabia for the Transfer of Military Supplies and Equipment (June 18, 1951), Exchange of Notes, 2 U.S.T. 1460, T.I.A.S. No. 2289.

[26] Agreement Providing for a Military Assistance Advisory Group (June 27, 1953), Exchange of Notes, 4 U.S.T. 1482, T.I.A.S. No. 2812 [hereinafter MAAG Agreement].

[27] Memorandum by the Officer in Charge, Arabian Peninsular Affairs (Awalt), to the Director of the Office of Near Eastern Affairs (Jones) (July 9, 1951) *in* 5 FOREIGN RELATIONS 1951, *supra* note 23, at 1061 [hereinafter Memorandum (July 9, 1951)] ("[O]utbreak of the Palestine war and the UN arms embargo delayed action [on the air base extension agreement]. . . .").

[28] *Id. See also* Memorandum of Conversation, by the Officer in Charge, Arabian Peninsular Affairs (Awalt) (July 10, 1951) *in* 5 FOREIGN RELATION 1951, *supra* note 23, at 1063 (referring to negotiator General Day Yingling's observations: "He emphasized how necessary was patience on our part in dealing with the Saudi Arabs. He also said we should avoid giving the impression of colonialism. The Saudi Arabs, he said, were extremely sensitive regarding their national dignity and sovereignty and would resent any suggestion of an imperialist attitude.").

[29] *See* 9 FOREIGN RELATIONS OF THE UNITED STATES 1952-54: THE NEAR AND MIDDLE EAST, PART 2, 2447, n.2 [hereinafter 9 FOREIGN RELATIONS 1952] ("Telegram 212 from Jidda, Nov. 9, reported the death of King Ibn Saud, and the accession to the throne of Crown Prince Saud. Prince Faisal, Minister of Foreign Affairs, had been designated the new Crown Prince.").

[30] Telegram from the Ambassador in Saudi Arabia (Hare) to the Department of State (Aug. 4, 1952) *id.* at 2418 ("During courtesy call on Prince Faisal . . . . I gave report MAAG negots and said unable understand adamant SAG [Saudi Arabian Government] position on jurisdiction which clearly less favorable than DAF [Dhahran Airfield] agreement. . . ."). The terms of the MAAG Agreement restricted the areas over which the United States commander exercised jurisdiction. *See* MAAG Agreement, *supra* note 26, para. 7(C)I, at 1485. The DAB Agreement granted the United States air base commander exclusive jurisdiction over offenses committed on the air base and primary jurisdiction over offenses committed in five Eastern Province towns and the road leading to them. *See* DAB Agreement, *supra* note 20, para. 13(c), at 1479.

[31] MAAG Agreement, *supra* note 26, para. 7(C)I, at 1485 ("If any military member of the Advisory Group commits an offense against the law of Saudi Arabia in the areas which are or may be specified for training operations. . . the Saudi Arabian authorities may arrest the offender and, after promptly completing the preliminary investigation, will turn him over without delay to the United States authorities. . . . ").

mitted in areas "specified for training operations."[31] The Saudis retained exclusive jurisdiction over civilian employees.[32] The Saudi Deputy Foreign Minister, Yusuf Yassin, tempered the debate over civilians by stating, "[A]lthough they [civilians] would be subject to Saudi law and jurisdiction, [they] would receive justice and equality under the law."[33]

The Saudis balanced the written word with its "practical application." The MAAG commanders received flexibility in resolving jurisdictional matters; the Saudi interest in sovereignty did not mean that they were inflexible.[34] The spirit of the MAAG Agreement survives, because the USMTM Accords incorporates key jurisdiction provisions by reference.[35]

In 1977, the USMTM Accords superseded the MAAG Agreement.[36] The historical threads of the 1950s negotiations and MAAG Agreement are woven into the fabric of the USMTM Accords.[37]

The USMTM Accords and Extrapolation

The USMTM Accords consist of twelve articles. Each article governs an aspect of the presence of USMTM personnel. These articles include a mission statement;[38] limitation on numbers of personnel;[39] logistical support arrangements;[40] and entry and exit requirements.[41]

The following discussion examines privileges and immunities that may attach to deployed forces incident to their relationship with the USMTM to Saudi Arabia.

Implied Consent and Extrapolation

The United States no longer holds to the absolutist theory that the "law of the flag" follows its troops.[42] The United States follows the restrictive theory that foreign sovereigns must consent to United States exercise of authority in their territory.[43] Authors suggest that no waiver of jurisdiction over visiting forces exists "based solely on an unconditional invitation from the host state."[44]

Factors such as joint cooperation, regular rotation of troops, and customary release of jurisdiction, evidences implied consent to jurisdiction over deployed forces in Saudi Arabia. Saudi Arabian authorities have exercised their rights to investigate and detain members of the forces but they have released criminal jurisdiction to United States forces for purposes of trial.[45] Deployed forces have a mission to accomplish: troops generally are too busy to make trouble for their hosts.

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[32] *Id.* para. 7(B), at 1485 ("Any offense committed by one of the individuals referred to in paragraph (A), excluding military personnel of the United States armed forces, *shall be subject to the local jurisdiction of the Kingdom of Saudi Arabia.*") (emphasis added).

[33] *See* Ed. Note, 9 FOREIGN RELATIONS 1952, *supra* note 29, at 2442.

[34] Telegram from the Ambassador in Saudi Arabia (Hare) to the Department of State (May 31, 1951), 5 FOREIGN RELATIONS 1951, *supra* note 23, at 1053 ("[I]t was clear throughout the negotiations that main preoccupation of Saudis provide "window dressing" to meet sensitivity on sovereignty question."). Saudi Arabia is sensitive to its Islamic neighbors' criticism of Saudi dealings with the West. Saudi Arabia is guardian of the Mosques located at Medina and Mecca. King Fahd has retitled himself "Custodian of the Two Holy Mosques."

[35] *See* USMTM Accords, *supra* note 4, art. 8, at 2411.

[36] *Id.* at 2409.

[37] *See id.* art. 8, at 2411 ("The provisions of Paragraph 7 of the Agreement of June 27, 1953, implementing the Agreement of June 18, 1951 . . . shall remain in force . . . until such time as modified or replaced by agreement of the parties. . . ."). The United States has not reached agreement on the jurisdictional formula.

[38] *See id.* at 2410-11 (Articles 1, 2, and 5).

[39] *Id.* (Articles 3 and 4).

[40] *Id.* (Articles 7 and 9).

[41] *Id.* at 2410-12 (Articles 7, 10, and 11).

[42] BRITTIN, *supra* note 3, at 210; *see also* Wilson v. Girard, 354 U.S. 525, 529 (1957).

[43] BRITTIN, *supra* note 3, at 210. *See also* DEP'T OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE, I, para. 10-3 (1 Sept. 1979) ("generally the only jurisdiction which United States military authorities could exercise over its military personnel in foreign countries was that which was permitted by the express consent of the foreign government concerned. The United States has sought to negotiate detailed agreements with all foreign countries where its forces are to be stationed.").

[44] BRITTIN, *supra* note 3, at 211 ("[F]rom the U.S. point of view it is desirable to retain the largest possible measure of military jurisdiction over its own forces . . . without a special grant by the host countries, the United States does not have this exclusive jurisdiction.").

[45] Interviews with Lieutenant Colonel Barry Simmons, former Staff Judge Advocate, USMTM, United States Air Force (USAF), (15 July 1993 through June 1994), and Colonel Ralph Capio, former Staff Judge Advocate, USMTM, USAF, (1 through 3 November 1994). In 1991, Saudi authorities investigated the circumstances of a civilian employee of USMTM accused of murder. *See* Sands v. Colby, 35 M.J. 620 (A.C.M.R. 1992).

> The petitioner retired from active duty with the Army in 1984 and was employed as a civilian for the United States Military Training Mission in Saudi Arabia. . . . On the morning of 18 July 1991, the petitioner's wife was found dead in their quarters on a military installation in Saudi Arabia. . . . After extensive negotiations . . . it was determined that the United States would exercise jurisdiction. . . . On 6 January 1992, the petitioner was ordered to active duty . . . for trial by court-martial . . . and was ordered to report to Fort Stewart, Georgia. . . .

Id. The court-martial acquitted the accused.

Exemption from Taxes and Duties

The Saudi Government exempts "from all taxes and duties on material, equipment, and supplies including foodstuffs, clothing and supplies, imported into Saudi Arabia . . . for official use of the U.S. Military Training Mission or its members."[46] A similar exemption applies to the household goods of both military and civilian personnel "identified on USMTM manning documents."[47] In practice, soldiers who are assigned on PCS to organizations other than USMTM receive similar consideration.[48] Deploying forces bring military materiel to accomplish their mission, consequently, they are similarly exempt from customs fees and duties.

The provisions of Article 7, USMTM Accords, are little changed from paragraph 6 of the MAAG Agreement, and paragraph 9(a)-(c) of the DAB Agreement. The USMTM Accords state that neither the mission nor its personnel may sell property "unless the appropriate authorities of the Saudi Arabian Government are informed in order that the applicable taxes may be collected."[49] This significantly affects the ability of the Defense Reutilization and Marketing Organization (DRMO) to sell or dispose of excess materiel. The DRMO has no official presence in Saudi Arabia. Thus, units should be prepared to ship out what they shipped in to Saudi Arabia.

Contract issues complicate the tax exemption matter. The ARCENT-SA contracted for the delivery of furniture "FOB Destination."[50] The first nine containers cleared the port of Dammam without customs fee. The Saudi authorities detained the remaining forty-eight containers pending payment of customs duties by the contractor. Because title did not vest in the United States until delivery, the contractor was obligated to bear the cost of customs fees. The Saudi authorities decline to accord the duty exemption to the contractor. Had the bill of lading reflected some nexus with the USMTM, the result could have been quite different.[51]

Saudi Arabian Jurisdiction

The Saudi Arabian government retains significant civil and criminal jurisdiction over all United States personnel.[52] The jurisdictional formula for Saudi Arabia incorporates the terms of paragraph 7(A)-(C) of the MAAG Agreement:

> The provisions of Paragraph 7 of the Agreement of June 27, 1953, implementing the Agreement of June 18, 1951, between the United States of America and Saudi Arabia shall remain in force. . . until such time as modified or replaced. . . .[53]

The formula subjects civilians to the "local jurisdiction of the Kingdom of Saudi Arabia."[54] Ambassador Hare reported to the State Department that he was "unable [to] understand [the] adamant SAG position on jurisdiction."[55] In retrospect, Ambassador Hare's concerns seem misplaced owing to Saudi deference to their guests.

The Saudi Arabian government waives jurisdiction over United States military personnel who commit offenses in specified areas.[56] The DAB Agreement granted the United

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[46] USMTM Accords, *supra* note 4, at 2410 (Article 7A).

[47] *Id.* (Article 7B).

[48] *Id.* The USMTM Transportation Office coordinated delivery and removal of the author's household goods in Saudi Arabia. The author did not pay customs fees or other duties.

[49] *Id.*

[50] ARCENT-SA Contract No. DASA01-92-C-0018 (firm-fixed price contract for the delivery of U.S. made furniture, for delivery at Khobar Towers, Saudi Arabia). In this matter, the majority of furniture items were delayed at the port of Dammam while the contractor attempted to avoid demurrage and other customs fees.

[51] *See* USMTM Accords, *supra* note 4, at 2410 (Article 7A).

[52] *Id.* at 2411 (Article 8).

[53] *Id.*

[54] MAAG Agreement, *supra* note 26, para. 7(C), at 1485; *see also* DAB Agreement, *supra* note 20, para. 13(a), at 1479.

[55] Telegram from the Ambassador in Saudi Arabia (Hare) to the Department of State (Aug. 4, 1952), 9 FOREIGN RELATIONS 1952, *supra* note 29, at 2418.

[56] MAAG Agreement, *supra* note 26, para. 7(C)l, at 1485. The agreement did not detail which areas the United States commander could exert jurisdiction. This is an area where the commander must develop an understanding with his Saudi counterparts and maximize his authority. *But see* DAB Agreement, *supra* note 20, para. 13(c)(ii), at 1479:

> In the case of any offense committed by a member of the armed forces of the United States *outside Dhahran Airfield at Al Khobar, Dammam, Dhahran, Ras Tanura, the beaches south of Al Khobar to Half Moon Bay, and the roads leading to these places*, the Saudi Arabian authorities will arrest the offender and . . . turn such person over to the Mission at Dhahran Airfield for trial and punishment under American jurisdiction.

(emphasis added).

States commander exclusive jurisdiction over offenses committed by military personnel on the Dhahran Air Base.[57] This provision disappeared through compromise in the MAAG Accords.

In cases of misconduct, the Saudi government "may arrest the offender and, after promptly completing the preliminary investigation, will turn him over without delay to the United States authorities for appropriate trial and punishment and/or disposition under American military jurisdiction."[58] In practice, the Saudi authorities effectively have waived criminal jurisdiction over military personnel without compromising their sovereignty.

In 1951, the prevailing view was that exposure to Saudi jurisdiction was de minimis.[59] Members of the MAAG had no reason to travel out of areas where the waiver of jurisdiction applied. As a practical matter, the negotiations of 1951 showed that the "main preoccupation of Saudis [was] sensitivity on sovereignty question."[60] Deployed forces of the 1990s have few occasions to travel far beyond their military environment and jeopardize the goodwill of their Saudi hosts.

In the 1952 negotiations concerning the MAAG Agreement, the Saudi position was that "members MAG [MAAG] wld [sic] come as *welcome guests* and that any difficulties wld [sic] be handled so as minimize complications."[61] The Islamic cultural concept of "guest" infers more than mere exercise of good manners; the term suggests a specific course of dealing that includes deference to the military guest, arising from one of the Five Pillars of Islam (alms-giving as a form of hospitality). In my own experience, commanders continue to inform deployed forces that they are considered "guests" of the King. This advice, coupled with competent host nation liaison, tends to smooth the impact of culture shock. In cases of misunderstanding, Ambassador Hare's bottom line advice is "practical adjustment. . . governs in such matters. . ."[62]

The USMTM Accords state that all United States personnel "shall comply with all applicable laws and regulations of the Kingdom of Saudi Arabia."[63] By contrast, Article II of the NATO SOFA requires that United States personnel "respect the law of the receiving State."[64] The implication is that the Saudis expect stricter compliance with their customs and laws. In Saudi Arabia, commanders of deployed forces ensure that their troops comply with Saudi customs and law by issuing general orders.[65]

Communications and Mail Privileges

The USMTM operates its own radio frequencies and mail services.[66] The deployed Army headquarters has theater-wide responsibility for maintaining the Defense Switched Network (DSN), yet has no explicit Saudi authority to run DSN lines.[67] Custom and military necessity legitimize the use of DSN.

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[57] DAB Agreement, *supra* note 20, para. 13(c)(i), at 1479 ("If any member of the armed forces of the United States commits an offense inside Dhahran Airfield he will be subject to United States military jurisdiction.").

[58] *Id.* 7(C)I, at 1485.

[59] Telegram from the Ambassador in Saudi Arabia (Hare) to the Department of State (May 31, 1951), 9 FOREIGN RELATIONS 1952, *supra* note 29, at 1054 ("Jurisdiction was thorny problem with Saudis insisting on jurisdiction over all civilians and also over mil[itary] personnel off base. . . . Mil[itary] offenders outside this area [specified towns and roads] would fall under Saudi law but this not believed important since travel rarely occurs except for MATS flights which so far have given no difficulty.").

[60] *Id.* at 1053.

[61] Telegram from the Ambassador in Saudi Arabia (Hare) to the Department of State (July 26, 1952), 9 FOREIGN RELATIONS 1952, *supra* note 29, at 2417 (emphasis added).

[62] Telegram from the Ambassador in Saudi Arabia (Hare) to the Department of State (May 31, 1951), 5 FOREIGN RELATIONS 1951, *supra* note 34, at 1055.

[63] MAAG Agreement, *supra* note 26, para. 7A, at 1485.

[64] Agreement Between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, Jun. 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 [hereinafter NATO SOFA].

[65] *See, e.g.*, Headquarters, Third United States Army and United States Army Forces Central Command, General Order No. 1, title: Prohibited Activities—US Army Forces Central Command personnel serving in Saudi Arabia (23 Mar. 1994); *see also* Headquarters, USCENTAF [US Central Air Forces Command], General Order No. 1, title: Prohibited Activities For Temporary Duty U.S. Air Force Personnel Attached to Units in the USCENTAF AOR (3 Jan. 1992). These orders restrict access to Islamic holy sites, prohibit offensive clothing, prohibit contraband such as alcohol and pornography, and impose an "individual duty to become familiar with and respect the laws, regulations, and customs of their host. . . ."

[66] *See* USMTM Accords, *supra* note 4, art. 9E, at 2412 ("The United States Military Training Mission shall be permitted to use radio codes by coordination with MODA [Ministry of Defense and Aviation]."). The 54th Signal Battalion provides signal support for USMTM in Saudi Arabia. The Battalion also stations soldiers in Bahrain and Kuwait.

[67] *See* Command Brief, *supra* note 9, at 5 ("Run Theater DSN links; Run Theater SATCOM/UHF for ADA").

Mail privileges became the first area of concern when the DAB Agreement went into force.[68] When King Ibn Saud died in 1953, his heir, Crown Prince Saud, unfamiliar with the spirit of the DAB Agreement, insisted on inspecting all United States mail.[69] King Saud soon restored mail procedures "in the same way as before."[70] Saudi authorities retain the sovereign right to inspect United States mail.[71] Because the USMTM operates the United States Postal Service operation in Saudi Arabia, deployed forces have extrapolated their mail privileges from operation of the USMTM Accords.

Base Exchange and Commissary Privileges

The USMTM operates the base exchange and commissary in Saudi Arabia.[72] Deployed forces use these facilities. The USMTM bars all contractor and retired military personnel from the PX and commissary owing to the following proscription of the USMTM Accords, "Use of these facilities will not be accorded to any contractor of any nationality."[73]

Contractor employees serving with deployed forces, who are promised access to the PX and Commissary in their stateside contracts, will not receive access owing to the proscription of international law.[74] Army lawyers should deliver appropriate predeployment briefings to these employees to avoid disappointment at the check-out line. Army lawyers who review contracts should ensure that the contracting officer does not make promises that deployed forces cannot keep.

Religious Matters

The USMTM Accords are silent on religious matters.[75] In 1951, the issue erupted when Saudi authorities requested that the United States recall an Air Force Chaplain who conducted Christian services in public.[76] The matter was resolved through "practical application" that required greater sensitivity on the part of military forces.[77] Commanders capably address their troops' spiritual needs without offending their Saudi hosts.

Express and Implied Extrapolation in Saudi Arabia

The United States extrapolates privileges and immunities via express and implied consent in Saudi Arabia. When the Office of the Program Manager for the Saudi Arabian National Guard (OPM-SANG) Modernization Project entered the

[68] Telegram from the Charge in Saudi Arabia (Jones to the Department of State (Oct. 14, 1953)) *in* 9 FOREIGN RELATIONS 1952, *supra* note 29, at 2446:

> Regarding Dhahran mail problem, Royal Decree of December 23, 1952 provides all packages entering country must be inspected. . . . Military and civilian personnel DAF subject, under terms paragraph 13(a) DAF Agreement, laws and regulations of Kingdom and SAG will apply all such laws unless *specific exemption exists*. Though agreement grants exemption customs duties, *nowhere specifies freedom from inspection of packages*.

(emphasis added).

[69] *Id.*

[70] Telegram from the Consul at Dhahran (Hackler) to the Department of State (Dec. 20, 1953) *id.* at 2449 ("King then said he wished [to]. . . cooperate fully [with] US and not place any hindrances in its way. At the same time he was determined [to] maintain Saudi sovereignty and while he fully realized US [was] not imperialistic state, hoped US would always keep this attitude in mind [in] its dealings [with] SAG officials.").

[71] Occasionally Saudi inspections reveal contraband. To the author's knowledge, the United States always has obtained jurisdiction to prosecute its troops. *See* Sands v. Colby, 35 M.J. 620 (A.C.M.R. 1992).

[72] *See* USMTM Accords, *supra* note 4, art. 9H, at 2412 ("The U.S. Military Training Mission will be allowed to maintain food commissary stores and site supply stores for its members and U.S. Government employees. . . .").

[73] *Id.*

[74] Memorandum, Staff Judge Advocate, Headquarters Third United States Army/Army Forces Central Command, AFRD-JA, to [Commander, ARCENT-SA], subject: Commissary/PX Use by Contractor Employees, para. 2 (3 Mar. 1994) ("Apparently the use of the Exchange and Commissary is a highly contentious issue and has been the source of more than one Congressional. The feeling at USMTM is that contractor use is prohibited and that the Saudis are not likely to allow this change to the Accords.").

[75] *But see* MAAG Agreement, *supra* note 26, para. 7(A), at 1485 ("All . . . personnel attached to the Advisory Group and their dependents shall comply with all applicable laws and regulations of the Kingdom of Saudi Arabia."). Saudi law requires strict adherence to Islamic customs and practices.

[76] Policy Statement Prepared in the Department of State (Feb. 5, 1951) *in* 5 FOREIGN RELATIONS 1951, *supra* note 23, at 1031,

> Saudi Arabian law does not permit the establishment of Christian churches in the country, nor are services lawful. The spiritual needs of the large number of Christians living in the Dhahran area have been taken care of by assembly in private on Aramco premises and on the air base under the auspices of the Air Force chaplain. The regularity of such assembly attracted the attention of local Arabs who entered and witnessed the proceedings.

See also S. MACKEY, THE SAUDIS: INSIDE THE DESERT KINGDOM, 99-101 (1987),

> To his credit, King Khalid . . . agreed to allow a loose . . . [grouping] of Christians . . . [but] no public organization . . . no publicity . . . no proselytizing. . . . In Riyadh the Protestants were housed in a combination basketball court and movie theater for U.S. military personnel training the Saudi Arabian National Guard. "Keep a low profile" was the watchword.

[77] Policy Statement Prepared in the Department of State (Feb. 5, 1951) *in* 5 FOREIGN RELATIONS 1951, *supra* note 23, at 1031.

Kingdom in 1973, the Saudis expressly granted them the same status as members of the Corps of Engineers.[78] The Saudis agreed to extrapolate the rights granted to the Corps of Engineers to the personnel of OPM-SANG via an exchange of notes.[79]

The United States Air Force uses implied consent to cover the privileges and immunities of its Logistics Support Group (LSG) personnel.[80] The LSG deployed to Saudi Arabia without express agreement. The LSG extrapolated its privileges from the people it supported in the F-5 Aircraft and Maintenance Program.[81] The LSG retains its F-5 privileges and immunities even though the F-5 project no longer exists.

The LSG arrangement parallels the situation of deployed forces. The concept of extrapolation is valid in Saudi Arabia. The mutual benefits shared between host and guest support the proposition that the Saudi Arabian government implied consent to the limited exercise of United States sovereignty on Saudi territory.

Conclusion

United States personnel who deploy to Saudi Arabia are guests of the "Custodian of the Two Holy Mosques." They pass through Saudi territory on a temporary basis. These forces complement their ally, the Kingdom of Saudi Arabia.

Status of forces arrangements in Saudi Arabia remain extremely fluid. Although deployed forces have no written status of forces coverage, they are granted implied immunities. Under terms of *The Schooner Exchange*, "a license to pass through a territory implies immunities not expressed. . . ."[82] The Saudi Arabian government has accorded deployed forces—as a matter of custom, implied consent, and military necessity—privileges and immunities similar to those enjoyed by the personnel of USMTM.

I recommend that judge advocates who support units deploying to Saudi Arabia obtain copies of the USMTM Accords, MAAG Agreement, and DAB Agreement, and coordinate with the Staff Judge Advocate, USMTM, for current interpretation of our status of forces arrangements. Use these documents to prepare your units for deployment. In this way, deployed forces can accomplish their mission while respecting the sovereignty of their Saudi hosts.

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[78] *See* OPM-SANG Agreement, pt. V, *supra* note 2, at 1108 ("Military personnel and civilian employees, and the dependents of such personnel and employees of the United States Government, present in Saudi Arabia in connection with this program, shall be accorded the privileges and immunities accorded to members of the United States Army Corps of Engineers and their dependents pursuant to Part VII of [the COE Agreement].").

[79] *Id.*

[80] USMTM/JA, USMTM LEGAL GUIDE TO SAUDI ARABIA, 12 (Jan. 1984) ("The AFLC Logistics Support Group does not have a specific international agreement governing their presence in Saudi Arabia. However there is an agreement effected by an exchange of notes in 1972 establishing the privileges and immunities for U.S. personnel under the F-5 Aircraft Maintenance and Training Program. . . Without going into detail, it is LSG's position that the F-5 agreement applies to all LSG personnel and their dependents."). *See also* Agreement on privileges and immunities for United States personnel engaged in the Training Program for the Maintenance and Operation of F-5 Aircraft in Saudi Arabia, Apr. 4-July 5 1972, Exchange of Notes, 23 U.S.T. 1469, T.I.A.S. No. 7425.

[81] USMTM/JA, USMTM LEGAL GUIDE TO SAUDI ARABIA, 12 (Jan. 1984).

[82] The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 140 (1812).

Analysis of Change 7 to the 1984 *Manual for Courts-Martial*

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Introduction

On 10 November 1994, the President signed Executive Order (EO) 12,936, which is Change 7 to the *Manual for Courts-Martial*[1] (*Manual*), United States, 1984. It took effect on 9 December 1994.

Change 7 resulted from the annual review of military justice conducted by the Joint Service Committee (JSC) on Military Justice. The JSC consists of representatives from each of the five services. It assists the President in his responsibilities under Article 36, Uniform Code of Military Justice (UCMJ) to ensure that courts-martial use "the principles of law and rules of evidence generally recognizable in the trial of criminal cases in US district courts."[2] The JSC's annual review results in draft amendments to the *Manual*. Some proposals reflect new United States Supreme Court decisions while other suggested changes are based on ideas generated by the JSC. Finally, some amendments to the *Manual* result from suggestions from the field or members of the public. After staffing through the Department of Defense, and approval by the Office of Management and Budget and the Department of Justice, the President signs the "change" to the *Manual* as an EO.[3] Change 7 is the seventh time an EO has amended the 1984 *Manual*.

This article analyzes Change 7 in four parts. It first discusses amendments to the R.C.M. Second, it examines changes to the MRE. Third, it looks at changes to part IV of the *Manual*. Finally, it analyzes a number of miscellaneous changes to the discussion and analysis portions of the *Manual*.

Changes to the R.C.M.

The following amendments to the R.C.M. were made by the President's EO:

a. R.C.M. 405(g)(1)(B) was amended to require the Article 32 investigating officer to notify the convening authority of defense requests for information under MRE 505 and 506. This puts the convening authority and other appropriate authorities on notice that a protective order, under subsection (g)(6) of this rule, may be necessary for the protection of any such privileged information that the government agrees to release to the accused.

b. R.C.M. 405(g)(6) complements the change to R.C.M. 405(g)(1)(B), discussed above. It now allows the convening authority to issue a protective order to safeguard information covered under MRE 505 and 506. This provision was added to allow the convening authority to attach conditions to the release of privileged information protected under MRE 505 and 506. This is accomplished by issuing a protective order similar in nature to that which a military judge issues under those rules. Though the prereferral authority to attach conditions already exists in MRE 505(d)(4) and 506(d)(4), these rules did not specify who may take such action on behalf of the government or the manner in which the conditions may be imposed.

c. An amendment to R.C.M. 905(f) clarifies that the military judge has the authority to take posttrial remedial action to correct any trial ruling that substantially affects the legal sufficiency of any finding of guilty or of the sentence, prior to authentication of the record.[4] Such remedial action may be taken at a pretrial session, during trial, or at a posttrial Article 39(a) session. This amendment, consistent with R.C.M. 1102(d), clarifies that posttrial reconsideration is permitted until the record of trial is authenticated. The amendment to the discussion clarifies that the amendment to subsection (f) does not change the standard to be used to determine the legal sufficiency of evidence.[5]

d. R.C.M. 917(f) is amended to clarify that a ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered by a military judge. A ruling denying a motion for a finding of not guilty, however, may be reconsidered at any time prior to authentication of the record

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[1] MANUAL FOR COURTS-MARTIAL, United States (1984) [hereinafter MCM].

[2] UCMJ art. 36 (1988).

[3] Not all aspects of any change to the *Manual* are part of the EO. The President must approve any amendments to Parts I to V of the *Manual*. Consequently, any change to the Rules for Courts-Martial (R.C.M.), Military Rules of Evidence (MRE), or offenses portion of the *Manual* are part of the EO. The accompanying "Discussion" or "Analysis," however, is not authoritative and is not part of the EO. An EO is not required, for example, to change most of the appendices in the *Manual*.

[4] *See* United States v. Griffith, 27 M.J. 42, 47 (C.M.A. 1988); *see also* United States v. Scaff, 29 M.J. 60, 65-66 (C.M.A. 1989).

[5] *See* MCM, *supra* note 1, R.C.M. 917(d); *Griffith*, 27 M.J. at 42; *Scaff*, 29 M.J. at 60.

of trial. The analysis accompanying R.C.M. 917(f) explains that "any reconsideration is limited to a determination as to whether the evidence adduced is legally sufficient to establish guilt rather than a determination based on the weight of the evidence which remains the exclusive province of the finder of fact." [6]

e. R.C.M. 1001(b)(5) is changed to clarify the admissibility of evidence of the accused's rehabilitative potential.[7] It also details the procedure for the presentation of this evidence by the trial counsel. The discussion to the Rule explains that "[o]n direct examination, a witness or deponent may respond affirmatively or negatively regarding whether the accused has rehabilitative potential." That witness also may "opine succinctly" about the accused's rehabilitative potential; the witness may express an opinion "that the accused has 'great' or 'little' rehabilitative potential."[8] The witness generally may not elaborate further; he or she may not describe the particular reasons for forming the opinion.

On redirect, however, a witness may testify regarding specific instances of conduct when the cross-examination of the witness concerned specific instances of conduct. Similarly, for example, on redirect a witness or deponent may offer an opinion on matters beyond the scope of the accused's rehabilitative potential if an opinion about such matters was elicited during cross-examination of the witness or deponent and is otherwise admissible.[9]

f. R.C.M. 1003(b)(2) adds retired and retainer pay as sources of income subject to forfeiture. The reference to "retired" and "retainer" pay was added to make clear that those forms of pay are subject to computation of forfeiture in the same way as basic pay. Articles 17, 18, and 19, UCMJ, do not distinguish between these types of pay.[10]

g. R.C.M. 1004(c)(4) corrects the aggravating factor for murder resulting from an inherently dangerous act by requiring that only *one* person other than the victim need be endangered.

h. R.C.M. 1004(c)(7)(B) is changed to make participation in certain drug transactions an aggravating factor allowing for the imposition of the death penalty if the drug activity occurred at the time of the commission of murder. This change reflects the increasing violence of drug trafficking and mirrors current federal statutes providing for the death penalty in certain drug-related killings.[11]

i. R.C.M. 1004(c)(7)(I) is changed to add the term "substantial physical harm." It is defined as "fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs or other serious bodily injuries." This change was made to clarify the type of injury that qualifies as an aggravating factor allowing for the imposition of the death penalty.[12]

j. R.C.M. 1102(b)(2) is amended to clarify that the military judge is authorized to conduct a posttrial, preauthentication Article 39(a) session to reconsider a trial ruling that substantially affects the legal sufficiency of any finding of guilty. This makes clear that a trial judge may take remedial action on behalf of the accused without waiting for an order from an appellate court.[13]

k. R.C.M. 1105(c)(1) is changed to clarify that the accused has ten days to respond to an addendum to the Staff Judge Advocate's (SJA) recommendation which contains new matter and that, in addition to the convening authority, the SJA may grant a request for an extension for up to twenty days. Only the convening authority, however, may deny such a request.

l. R.C.M. 1106(f)(7) is changed to provide that when new matters are addressed in an addendum to the SJA's recommendation, the addendum must be served on both the accused and counsel.

Changes to the MRE

The President made the following amendments to the MRE:

a. MRE 305(d)(1)(B) is changed to conform military practice with *McNeil v. Wisconsin*.[14] In *McNeil*, the United States Supreme Court clarified the distinction between the Sixth

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[6] *See Griffith*, 27 M.J. at 42.

[7] This change to R.C.M. 1001(b)(5) is based on the decisions in the following cases: United States v. Pompey, 33 M.J. 266 (C.M.A. 1991); United States v. Claxton, 32 M.J. 159 (C.M.A. 1991); United States v. Aurich, 31 M.J. 95 (C.M.A. 1990); United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989); United States v. Horner, 22 M.J. 294 (C.M.A. 1986).

[8] MCM, *supra* note 1, R.C.M. 1001(b)(5)(D), discussion.

[9] *See generally id.* MIL. R. EVID. 701 (opinion testimony by lay witnesses), 703 (bases of opinion testimony by experts, if the witness or deponent is testifying as an expert).

[10] Sentences including forfeiture of these types of pay were affirmed in United States v. Hooper, 9 C.M.A. 637, 26 C.M.R. 417 (1958) (retired pay); United States v. Overton, 24 M.J. 309 (C.M.A. 1987) (retainer pay).

[11] *See* 21 U.S.C.A. § 848(e) (West 1994).

[12] *See* United States v. Murphy, 30 M.J. 1040, 1056-58 (A.C.M.R. 1990).

[13] *See* United States v. Griffith, 27 M.J. 42, 47 (C.M.A. 1988).

[14] 501 U.S. 171 (1991).

Amendment right to counsel and the Fifth Amendment right to counsel. The Court reiterated that the Sixth Amendment right to counsel does not attach until the initiation of adversarial proceedings. In the military, this normally occurs at preferral of charges.[15] It is possible, however, that under unusual circumstances, courts may find that the Sixth Amendment right attaches prior to preferral.[16] Because conditions on liberty, restriction, arrest, or confinement do not trigger the Sixth Amendment right to counsel, references to these events were eliminated from the rule. These events may be offered, however, as evidence that the government has initiated adversarial proceedings in a particular case.

b. MRE 305(e)(1) is changed to reflect the United States Supreme Court decisions in *Minnick v. Mississippi*,[17] and *McNeil v. Wisconsin*,[18] and to distinguish between the right to counsel rules under the Fifth and Sixth Amendments. In *Minnick*, the Court determined that the Fifth Amendment right to counsel[19] requires that when a suspect in custody requests counsel, interrogation may not proceed unless counsel is *present*. Government officials may not reinitiate custodial *interrogation* in the absence of counsel regardless of whether the accused has consulted with his or her attorney.[20] This rule does not apply, however, when the accused or suspect initiates reinterrogation regardless of whether the accused is in custody.[21] The impact of a waiver of counsel rights on the *Minnick* rule is discussed in the analysis to subdivision (g)(2) of this rule.

c. Subdivision (e)(2) follows *McNeil* and applies the Sixth Amendment right to counsel to military practice. Under the Sixth Amendment, an accused is entitled to representation at critical confrontations with the government after the initiation of adversarial proceedings. In accordance with *McNeil*, the amendment recognizes that this right is offense-specific and, in military law, that it normally attaches when charges are preferred.[22] Note that subdivision (e)(2) replaces the prior notice to counsel rule based on *United States v. McOmber*,[23] because it is inconsistent with *Minnick* and *McNeil*.

d. MRE 305(f) is changed to clarify the distinction between the rules that apply to the exercise of the privilege against self-incrimination and the right to counsel. Subsection (1) states that "questioning must cease immediately" when a person exercises the privilege against self-incrimination. Subsection (2) states that when a suspect asks for counsel, "questioning must cease until counsel is present."

e. The amendment to MRE 305(g)(2) divides subdivision (2) into three sections. Subsection (2)(A) remains unchanged from the first sentence of the previous rule. Subsection (2)(B) is new and conforms military practice with the United States Supreme Court's decision in *Minnick v. Mississippi*.[24] In that case, the Court provided that an accused or suspect can validly waive his Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation, by initiating the subsequent interrogation leading to the waiver.[25] This is reflected in subsection (2)(B)(i). Subsection (2)(B)(ii) establishes a presumption that a coercive atmosphere exists that invalidates a subsequent waiver of counsel rights when the request for counsel and subsequent waiver occur while the accused or suspect is in continuous custody.[26] The government can overcome this presumption when it demonstrates that a break in custody, which sufficiently dissipated the coercive environment, occurred.[27]

Subsection (2)(C) also is new and conforms military practice with the Supreme Court's decision in *Michigan v. Jackson*.[28] In *Jackson*, the Court held that a suspect can validly waive his or her Sixth Amendment right to counsel, after hav-

[15] *See* United States v. Jordan, 29 M.J. 177, 187 (C.M.A. 1989); United States v. Wattenbarger, 21 M.J. 41, 43 (C.M.A. 1985), *cert. denied*, 477 U.S. 904 (1986).

[16] *See Wattenbarger*, 21 M.J. at 43-44.

[17] 498 U.S. 146 (1990).

[18] 501 U.S. 171 (1991).

[19] *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477 (1981); Arizona v. Roberson, 486 U.S. 675 (1988).

[20] *Minnick*, 498 U.S. at 150-52.

[21] *Id.* at 154-55; *Roberson*, 486 U.S. at 677.

[22] *See* United States v. Jordan, 29 M.J. 177, 187 (C.M.A. 1989); United States v. Wattenbarger, 21 M.J. 41 (C.M.A. 1985), *cert. denied*, 477 U.S. 904 (1986).

[23] 1 M.J. 380 (C.M.A. 1976). Although *McOmber* was decided on the basis of Article 27, UCMJ, the case involved a Sixth Amendment claim by the defense, an analysis of the Fifth Amendment decisions of *Miranda*, 384 U.S. at 436 and United States v. Tempia, 16 C.M.A. 629, 37 C.M.R. 249 (1967), and the Sixth Amendment decision of Massiah v. United States, 377 U.S. 201 (1964). Moreover, the *McOmber* rule has been applied to claims based on violations of both the Fifth and Sixth Amendments. *See, e.g.*, United States v. Fassler, 29 M.J. 193 (C.M.A. 1989).

[24] 498 U.S. 146 (1990).

[25] *Id.* at 156.

[26] *See* McNeil v. Wisconsin, 501 U.S. 171 (1991); Arizona v. Roberson, 486 U.S. 675 (1990).

[27] *See* United States v. Schake, 30 M.J. 314 (C.M.A. 1990).

[28] 475 U.S. 625, 636 (1986).

ing previously claimed that right, by initiating the subsequent interrogation leading to the waiver. The Court differentiated between assertions of the Fifth and Sixth Amendment right to counsel by holding that, while exercise of the former barred further interrogation on the same or other offenses in the absence of counsel, the Sixth Amendment protection only attaches to those offenses as to which the right originally was asserted. Additionally, while continuous custody will invalidate a subsequent waiver of a Fifth Amendment right to counsel, continuous custody, or the lack of it, is irrelevant to Sixth Amendment rights. The latter attach once formal proceedings begin and the accused asserts the right to counsel. The goal is to give an accused the opportunity to have counsel serve as a buffer between the accused and the government.

f. MRE 314(g)(3) is changed to incorporate the *Buie v. Maryland*[29] "protective sweep" standard and "attack area" searches, into permissible searches for other persons incident to arrest. The rule specifies the circumstances permitting the search for other persons and distinguishes between protective sweeps and searches of the attack area.

Subsection (A) permits protective sweeps in the military. The last sentence of this subsection explains that an examination under the rule need not be based on probable cause. Rather, this subsection adopts the standard articulated in *Terry v. Ohio*[30] and *Michigan v. Long*.[31] There must be articulable facts that—when taken together with the rational inferences from those facts—would warrant a reasonably prudent officer in believing the area harbors individuals posing a danger to those at the site of apprehension. The previous language referring to those "who might interfere" was deleted to conform to the standards set forth in *Buie*. Note that an examination under this rule is limited to a cursory visual inspection of those places in which a person might be hiding.

As a result of *Buie*, a new subsection (B) also was added. It states that apprehending officials may examine the "attack area" for persons who might pose a danger to apprehending officials.[32] The attack area is that area immediately adjoining the place of apprehension from which an attack could be immediately launched. Apprehending officials do not need any suspicion to examine the attack area.

g. MRE 404(b) is changed to require the prosecution to provide, on request by the accused, notice of the general nature of the MRE 404(b) evidence the prosecution intends to introduce at trial. Consequently, trial counsel introducing uncharged misconduct relating to motive, opportunity, absence of mistake, plan, and the like will be providing notice on request. This change to MRE 404(b) is based on the 1991 amendment to Federal Rule of Evidence 404(b).

Changes to the *Manual*, Part IV

a. Part IV, paragraph 44e(1) is amended by increasing the confinement portion of permissible punishments for voluntary manslaughter to fifteen years. The ten-year maximum confinement period was unnecessarily restrictive; an egregious case of voluntary manslaughter may warrant confinement in excess of ten years.

b. Part IV, paragraph 44e(2) is amended by increasing the confinement portion of permissible punishments for involuntary manslaughter to ten years. This amendment eliminated the anomaly created when the maximum authorized punishment for a lesser-included offense of involuntary manslaughter was greater than the maximum authorized punishment for the offense of involuntary manslaughter. For example, prior to the amendment, the maximum authorized punishment for the offense of aggravated assault with a dangerous weapon was greater than that of involuntary manslaughter. This amendment also facilitates instructions on the lesser included offense of involuntary manslaughter.[33]

c. Part IV, paragraph 45e is amended by creating two distinct categories of carnal knowledge for sentencing purposes—one involving children who are twelve years old at the time of the offense, and the other for those who are younger than twelve years. Consequently, the punishment for the older children is increased from the current fifteen years imprisonment to twenty years confinement. The maximum confinement for carnal knowledge of a child under twelve years is increased to life imprisonment.

The goal of these changes is to bring the punishments more in line with those for sodomy of a child under paragraph 51e of Part IV and with the Sexual Abuse Act of 1986.[34] This furthers the policy of gender neutrality contained in the Sexual Abuse Act.

d. Part IV, paragraph 51e is amended to increase maximum punishments permitted under Article 125, UCMJ. Like the change to paragraph 45(e), the purpose of this change is to bring the punishments for sodomy more in line with Article 120, UCMJ, and the Sexual Abuse Act of 1986, so that punishments generally are equivalent regardless of the victim's gender. Consequently, subparagraph e(l) was amended by

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[29] 494 U.S. 325 (1990).

[30] 392 U.S. 1 (1968).

[31] 463 U.S. 1032 (1983).

[32] *See Buie*, 494 U.S. at 334.

[33] *See* United States v. Emmons, 31 M.J. 108 (C.M.A. 1990).

[34] 18 U.S.C.A.§§ 2241-2245 (West 1994).

increasing the maximum period of confinement for forcible nonconsensual sodomy from twenty years to life. Additionally, subparagraph e(2) was amended by creating two distinct categories of sodomy involving a child—one involving children who have attained the age of twelve but are not yet sixteen, and the other involving children under the age of twelve. The latter is now designated as subparagraph e(3). The punishment for the former category remains the same as it was for the original category of children under the age of sixteen—twenty years confinement. The maximum punishment when the victim is under the age of twelve years, however, is increased to life imprisonment.

e. Part IV, paragraph 85e is amended to increase the maximum punishment from a bad conduct discharge, total forfeitures, and confinement for one year, to a dishonorable discharge, total forfeitures, and confinement for three years. This eliminated the incongruity between having a maximum punishment for drunken driving resulting in injury, but not causing death, exceeding that of negligent homicide.

Changes to the Discussion and Analysis of the R.C.M. and MRE

A number of changes to the discussion and analysis portions of the R.C.M. and MRE also were made by Change 7. These changes are not part of the EO, because they are "unofficial" explanatory commentary reflecting the intent of the Drafters. However, they merit discussion because military justice practitioners look to the discussion and analysis portions of the *Manual* for guidance.

a. The discussion of R.C.M. 705(b)(2)(c) is changed to explain that a convening authority may withdraw charges from a court-martial and dismiss them if the accused fulfills the accused's promises in the agreement. Except when jeopardy has attached, such withdrawal and dismissal does not bar later reinstitution of the charges by the same or a different convening authority. Additionally, a military judge's determination that the accused breached a pretrial agreement is not required before reinstituting charges previously withdrawn or dismissed in accordance with the agreement. This change is based on *United States v. Verrusio*.[35] However, if the defense moves to dismiss the reinstituted charges on the grounds that the government remains bound by the terms of the pretrial agreement, the trial counsel will be required to prove, by a preponderance of the evidence, that the accused has breached the terms of the pretrial agreement.[36]

b. The discussion accompanying R.C.M. 906(b)(13) is amended to explain that a military judge has discretion "to rule on an evidentiary question before it arises during trial."[37] *Luce v. United States* governs reviewability of preliminary rulings.[38]

c. The discussion accompanying R.C.M. 912(g)(1) is amended to add that "[g]enerally, no reason is necessary for a peremptory challenge."[39]

d. The discussion following R.C.M. 1004(c)(8) is changed to read that

> [c]onduct amounts to "reckless indifference" when it evinces a wanton disregard of consequences under circumstances involving grave danger to the life of another, although no harm is necessarily intended. The accused must have had actual knowledge of the grave danger to others or knowledge of circumstances that would cause a reasonable person to realize the highly dangerous character of such conduct. In determining whether participation in the offense was major, the accused's presence at the scene and the extent to which the accused aided, abetted, assisted, encouraged, or advised the other participants should be considered.[40]

This change to the discussion complements the President's amendments to R.C.M. 1004(c), as discussed above.

e. The discussion accompanying R.C.M. 1106(f)(1) is amended to clarify that "[t]he method of service and the form of proof of service are not prescribed and may be by any appropriate means. For example, a certificate of service, attached to the record of trial, would be appropriate when the accused is served personally."

f. The first paragraph of the analysis accompanying MRE 304(b)(1) is amended to explain that the Rule adopts *Harris v.*

[35] 803 F.2d 885 (7th Cir. 1986). Procedures used in federal civilian practice, such as a motion by the government for relief from its obligation under the agreement before it proceeds to the indictment stage (*see* United States v. Ataya, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988)), do not apply to military practice and thus are not required. *See generally* MCM, *supra* note 1, R.C.M. 801(a).

[36] If the agreement is intended to grant immunity to an accused, *see* MCM, *supra* note 1, R.C.M. 704.

[37] *But see id.* R.C.M. 905(b)(3) and (d); MIL. R. EVID. 304(e)(2); 311(e)(2); 321(d)(2).

[38] 469 U.S. 38 (1984).

[39] *But see* Batson v. Kentucky, 476 U.S. 79 (1986); United States v. Curtis, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1177 (1992); United States v. Moore, 28 M.J. 366 (C.M.A. 1989); United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988).

[40] *See* United States v. Berg, 31 M.J. 38 (C.M.A. 1990); United States v. McMonagle, 38 M.J. 53 (C.M.A. 1993).

New York.[41] This means that statements taken in violation of the counsel warnings required under R.C.M. 305(d) to (e) may be used for impeachment or at a later trial for perjury, false swearing, or the making of a false official statement.

Conclusion

Change 7 to the *Manual* is the latest result of the JSC's annual review of military justice. Changes 8 and 9 to the *Manual* are scheduled for the President's consideration and approval in early 1995. The JSC is now working on its 1994-95 review of military justice, which will be Change 10 to the *Manual*.

All military justice practitioners are encouraged to submit comments about the *Manual* or UCMJ, or proposals for future changes to both, to the Criminal Law Division, OTJAG, for possible referral to the JSC.

[41] 401 U.S. 222 (1971). Under paragraphs 140a(2) and 153b of the 1969 *Manual*, use of such statements was not permissible. United States v. Girard, 23 C.M.A. 263, 49 C.M.R. 438 (1975); United States v. Jordan, 20 C.M.A. 614, 44 C.M.R. 44 (1971). The Court of Military Appeals has recognized expressly the authority of the President to adopt the holding in *Harris* on impeachment. *See Jordan*, 20 C.M.A. at 614, 617, 44 C.M.R. at 47; MCM, *supra* note 1, MIL. R. EVID. 304(b) (adopting *Harris* in military law). Subsequently, in Michigan v. Harvey, 494 U.S. 344 (1990), the Supreme Court held that statements taken in violation of Michigan v. Jackson, 475 U.S. 625 (1986), also could be used to impeach a defendant's false and inconsistent testimony. In so doing, the Court extended the Fifth Amendment rationale of *Harris* to Sixth Amendment violations of the right to counsel.

The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases

The Honorable Sam Nunn *

Introduction

The armed forces of the United States comprise the most effective military force in the world today. Our military forces have the training, equipment, and leadership necessary to defend the vital national interests of the United States. At a time when our nation is the world's sole superpower and a model for emerging democracies throughout the world, the effectiveness of our military forces is a matter of the highest national importance.

Morale and discipline of the armed forces is at the heart of military effectiveness. Military law is a vital element in maintaining a high state of morale and discipline. Members of the armed forces must have a clear understanding of the standards of conduct to which they must conform, and they must also have confidence that the system of justice will operate in a fair and just manner.

The constitutional responsibility for establishing regulations for land and naval forces is vested in Congress.[2] The rights of military personnel are established by Congress and the Executive Branch, acting under the authority granted by Congress. The Supreme Court's jurisprudence in the field of military law has been characterized by the highest degree of deference to the role of Congress and respect for the judgment of the armed forces in the delicate task of balancing the interests of national security and the rights of military personnel.

In this essay, I will review the fundamental principles enunciated by the Supreme Court in military cases and assess the continuing validity of these principles as a guide for judicial review of military cases.

Military Service Is a Unique Calling

"[I]t is the primary business of armies and navies to fight or be ready to fight should the occasion arise."[2]

* United States Senate (D-Ga.). Chairman, Senate Armed Services Committee. For the convenience of the reader, this essay is adapted from S. REP. No. 112, 103d Cong., 1st Sess. (1993) (Report of the Senate Armed Services Committee on the National Defense Authorization Act for Fiscal Year 1994). The views herein are my own and do not necessarily represent the views of the Committee on Armed Services.

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[1] U.S. CONST. art. I, § 8.

[2] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

"The military constitutes a specialized community governed by a separate discipline from that of the civilian."[3]

"[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life."[4]

The primary mission of the armed forces is to defend our national interests by preparing for and, when necessary, waging war, using coercive and lethal force. Responsibility for the awesome machinery of war requires a degree of training, discipline, and unit cohesion that has no parallel in civilian society.

The armed forces must develop traits of character, patterns of behavior, and standards of performance during peacetime in order to ensure the effective application and control of force in combat. Members of the armed forces are subject to disciplinary rules and military orders, twenty-four hours a day, regardless of whether they are actually performing a military duty.

Military service is a unique calling. It is more than a job. Our nation asks the men and women of the armed forces to make extraordinary sacrifices to provide for the common defense. While civilians remain secure in their homes, with broad freedom to live where and with whom they choose, members of the armed forces may be assigned, involuntarily, to any place in the world, often on short notice, often to places of grave danger, often in the most spartan and primitive conditions.

For the sailors in the Persian Gulf, their ship is home. For the soldiers on the DMZ in Korea, their barracks is home. For the Marines who served in Somalia in Operation Restore Hope, their tent was home.

Military men and women do not have the right to choose with whom they will share these homes. They do not have the right to choose with whom they will share these burdens. They do not have the right to choose whether they will be placed in harm's way or under what conditions. Most important, they do not have the right to choose when and where they may be asked to make the ultimate sacrifice for their country.

General Gordon Sullivan, Chief of Staff of the Army, has eloquently summarized the differences between military and civilian life:

> What separates us from civilian society is ultimate sacrifice, the sacrifice of our lives for our country. We have to sublimate everything that we do to selfless service to our Nation. Duty, honor, country . . . . [I]t is, in fact, that mission, the protection of the Nation, which must govern everything that we do.[5]

Although the individual decision to join the armed forces, in the absence of actual draft calls, is a voluntary choice, there is no constitutional right to serve in the military.[6] The armed forces routinely restrict the opportunities for service on the basis of circumstances such as physical condition, age, sex, parental status, educational background, medical history, and mental aptitude.[7] These restrictions primarily reflect professional military judgment as to what categories of personnel contribute to overall combat effectiveness rather than narrow performance criteria related to the performance of a specific task. They are based on the fact that members of the armed forces are not recruited for a single job at a single location. They must be capable of serving not as an individual, but as a member of a team, in a variety of assignments and locations, often under dangerous and life-threatening conditions.

Once military status is acquired, military service loses its voluntary character. Once an individual has changed his or her status from civilian to military, that person's duties, assignments, living conditions, privacy, and grooming standards are all governed by military necessity, not personal choice. In a nation that places great value on freedom of expression, freedom of association, freedom of travel, and freedom of employment, the armed forces stand as a stark exception. Military commanders have the authority, as they have throughout our nation's history, to tell service members where to live, where to work, and when they must put their lives at risk. Further, commanders are authorized to use the criminal law, the Uniform Code of Military Justice, to punish those who disobey any such orders.[8]

Unit Cohesion Is the Foundation of Combat Capability

"[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[9]

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[3] Orloff v. Willoughby, 345 U.S. 53, 94 (1953). *Accord* Parker v. Levy, 417 U.S. 733, 743 (1974) ("The military is, by necessity, a specialized society separate from civilian society.").

[4] Schlesinger v. Councilman, 420 U.S. 735, 757 (1975).

[5] S. REP. NO. 112, 103d Cong., 1st Sess. 273 (1993) (testimony of General Gordon R. Sullivan, Chief of Staff, United States Army, before the Senate Armed Services Committee, July 20, 1993).

[6] Nieszner v. Mark, 654 F.2d 562, 564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978).

[7] *See* DEP'T OF DEFENSE, DIRECTIVE 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION (Mar. 4, 1994).

[8] The Uniform Code of Military Justice is codified at 10 U.S.C.A. §§ 801-946 (West 1994).

[9] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

General H. Norman Schwarzkopf, United States Army (Ret.), who commanded United States forces in Operations Desert Shield and Desert Storm, has stated:

> What keeps soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy, what keeps the marines attacking up the hill under withering machine gun fire, what keeps the pilots flying through heavy surface-to-air missile fire to deliver bombs on targets is the simple fact that they do not want to let down their buddies on the left or on the right.
>
> They do not want to betray their unit and their comrades with whom they have established a special bond through shared hardship and sacrifice not only in the war but also in the training and the preparation for the war.
>
> It is called unit cohesion, and in my 40 years of Army service in three different wars, I have become convinced that it is the single most important factor in a unit's ability to succeed on the battlefield.[10]

General Gordon Sullivan, Chief of Staff of the Army, has emphasized the importance of the bonds of trust between soldiers. Quoting from a letter in which one soldier wrote to another, "I always knew if I were in trouble and you were still alive that you would come to my assistance," General Sullivan added:

> Every officer in the United States Army . . . every soldier [and] noncommissioned officer . . . everyone in the services must know that. I will give up my life for them; and they, in turn will give up their life for me. I have to have trust in them, and them in me.[11]

General Colin Powell, during his tenure as Chairman of the Joint Chiefs of Staff, emphasized:

> [t]o win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.[12]

General Powell noted that the armed forces give constant attention to the development and maintenance of unit cohesion.

> Bonding begins on the first day of boot camp. Bonding takes place every time a GI joins a new unit. A unit must bond as a fighting force before it is sent to the battlefield. Unit members work together, train together, and deploy together sharing experiences that contribute to the development of cohesion. Mutual trust, common core values, self confidence, and realization of shared goals help to form the cohesive military team. Cohesion requires the sacrifice of personal needs for the needs of the unit, subjugating individual rights to the benefit of the team.

While individual initiative is rewarded, the contribution of the team—the cohesive unit—is what guarantees military success.[13]

Dr. William Darryl Henderson, a decorated combat veteran, former commander of the Army Research Institute, and author of *Cohesion: The Human Element in Combat*, has illustrated the role of unit cohesion in transforming a collection of disparate individuals into a motivated, combat capable group willing to endure and prevail amidst the horrors of war:

> [T]he nature of the relationship among soldiers in combat is a critical factor in combat motivation . . . .
>
> The real question is: why soldiers fight? What causes soldiers to repeatedly expose themselves to the most lethal environment known, instead of taking cover or leaving the area as quickly as possible.
>
> Combat motivation is not a mythical force that emerges on the battlefield. It must be developed and maintained well in advance of any war . . . .

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[10] S. REP. NO. 112, 103d Cong., 1st Sess. 274-75 (testimony of General H. Norman Schwarzkopf, United States Army (Ret.), before the Senate Armed Services Committee, May 11, 1993). General Schwarzkopf's distinguished career also included combat in Vietnam and senior military personnel management responsibilities.

[11] *Id.* at 275 (testimony of General Gordon L. Sullivan, Chief of Staff, United States Army, before the Senate Armed Services Committee, July 20, 1993).

[12] *Id.* (testimony of General Colin L. Powell, United States Army, Chairman of the Joint Chiefs of Staff, before the Senate Armed Services Committee, July 20, 1993).

[13] *Id.* (written answer of General Colin L. Powell in response to a question from the Senate Armed Services Committee).

> A central finding of cohesion research is that the nature of modern war dictates that small-unit cohesion is the only force capable of causing soldiers to expose themselves repeatedly to enemy fire in the pursuit of unit objectives.
>
> The confusion, danger, hardship, dispersion, and isolation of modern war requires that soldiers, sailors, and airmen in combat be controlled and led through an internalization of soldier values and personal operating rules that are congruent with the objective, goals, and values of the organization . . . .[14]

Dr. Henderson summarized his findings on the importance of unit cohesion by citing S.L.A. Marshall, who noted that "one of the simplest truths of war [is] that the thing which enables an infantry soldier to keep going with his weapon is the near presence or presumed presence of a comrade."[16]

Dr. David Marlowe, Chief of the Department of Military psychiatry at the Walter Reed Army Institute of Research, has observed that unit cohesion must be developed long before a unit is on the battlefield:

> Cohesion is not something magical. It does not suddenly happen the moment the bullets come. If it was not there to begin with, it is going to take a long time and some dead and mangled bodies before you get it.[16]

Dr. Marlowe has noted that while it is difficult to project current trends into the future, he anticipated that unit cohesion would continue to be a paramount concern:

> [T]echnological advances, smaller forces, battlefield dispersal, and the shift to a force projection modality have made the continuing maintenance of highly cohesive units more important to the future than they have ever been in the past and the immediate present.
>
> In the past, in time of danger we have usually been . . . afforded the luxury of time in which to create highly cohesive units to counterpunch or strike the enemy. When we have not had that luxury, the results, as in the initial results of the Korean conflict, were disastrous for our soldiers.

The speed with which events and their consequences now overtake us make it imperative that our forces be able to make an immediate transition from peace to war. High continuing levels of cohesion are critical to making that transition with maximum unit effectiveness and minimal short- or long-term negative effects on the mental health, physical health, and performance of the soldier.[17]

The end of the Cold War has not diminished the need for military forces composed of readily available, highly cohesive units. Events in Somalia and the former Yugoslavia, as well as continuing tensions in areas ranging from the Korean border to the Persian Gulf, have demonstrated that units-in-being must be prepared to deploy to hostile, inhospitable conditions, with little advance warning or preparation.

Military Personnel Policy Must Facilitate the Assignment and Worldwide Deployment of Members of the Armed Forces

> *"The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'"*[18]

Deployment to field or on board vessels for training or operations is one of the defining characteristics of military service. Although many service members, in garrison, have the opportunity to live off-post or in on-post quarters providing substantial privacy, the armed forces do not train or deploy in a garrison environment. General Colin Powell, in his capacity as Chairman of the Joint Chiefs of Staff, observed:

> [W]hile some military specialties may gravitate to office type settings no Servicemember is guaranteed a particular assignment in a particular location. We are provided assignments anywhere in the world, often at very short notice, based on the needs of the Army, Navy, Air Force, or Marine Corps. Every military man and woman must be prepared to serve wherever and in whatever capacity the Armed Forces require their skills. Even forward deployed units need cooks and typists.[19]

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[14] *Id.* at 275-76 (testimony of Dr. William Darryl Henderson before the Senate Armed Services Committee).

[15] *Id.* at 276.

[16] *Id.* (testimony of Dr. David Marlowe, Chief of the Department of Military Psychiatry, Walter Reed Army Institute of Research, before the Senate Armed Services Committee, Mar. 31, 1993).

[17] *Id.* at 276-77.

[18] Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

[19] S. REP. No. 112, 103d Cong., 1st Sess. 277 (written answer of General Colin L. Powell in response to a question from the Senate Armed Services Committee).

Military personnel policy reflects the conditions under which service members live while deployed for training or operations. As General Powell has noted:

> [T]he majority of our young men and women are required to live in communal settings that force intimacy and provide little privacy. It may be hard to contemplate spending 60 continuous days in the close confines of a submarine; sleeping in a foxhole with half a dozen other people; 125 people all living and sleeping in the same 40 by 50 foot, open berthing area, but this is exactly what we ask our young people to do.[20]

Deployment under such conditions is the reality of service in the armed forces of the United States. Military personnel policy cannot be based upon what might work in the white collar setting of a stateside garrison. Rather, policies must reflect the very realistic possibility that the soldier who is behind a comfortable desk today might be in a hostile and physically challenging field environment on very short notice.

The Constitutional Responsibility for Establishment of Qualifications for and Conditions of Military Service Is Vested in the Congress

"The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[21]

"[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."[22]

"[J]udicial deference to . . . congressional exercise of authority is at its apogee when legislative action [is] under the congressional authority to raise and support armies and make rules and regulations for their governance . . . ."[23]

"[I]n determining what process is due, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces . . . .'"[24]

The Framers of the Constitution vested Congress with powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.[25] Pursuant to these powers, Congress is given the discretion to determine the qualifications for and conditions of service in the armed forces.[26] The President may supplement, but not supersede, the rules established by Congress for the government and regulation of the armed forces.[27]

The role of the courts in reviewing military personnel matters is even more circumscribed. Although the constitutional

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[20] *Id.*

[21] United States v. O'Brien, 391 U.S. 367, 377 (1968). *See also* Parker v. Levy, 417 U.S. 733, 756 (1974) ("Congress is permitted to legislate both with greater breadth and with greater flexibility" when regulating military personnel.).

[22] Gilligan v. Morgan, 413 U.S. 1, 10 (1973). *See also Orloff*, 345 U.S. at 93-94 ("[J]udges are not given the task of running the Army . . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181,187 (1962)) ("[C]ourts are 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'"); *Goldman*, 475 U.S. at 507 ("[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.").

[23] Rostker v. Goldberg, 453 U.S. 57, 70 (1981). The Court also noted that "[W]e must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Id.* at 68. *See also* Solorio v. United States, 483 U.S. 435, 447-48 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military . . . . We have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated.").

[24] Weiss v. United States, 114 S. Ct. 752, 760 (1994) (quoting Middendorf v. Henry, 425 U.S. 25, 43 (1976)). The relationship between the role of Congress and the due process rights of military personnel has been a constant theme in the Supreme Court's military cases:

> [W]e have recognized . . . that "the tests and limitations [of due process] may differ because of the military context." The difference arises from the fact that the Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."

Weiss, 114 S. Ct. at 760 (citations omitted). "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman*, 475 U.S. at 507. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." *Parker*, 417 U.S. at 758.

[25] U.S. CONST. art. I, § 8.

[26] Detailed statutory mandates on the qualifications for and conditions of military service are found primarily in Title 10 of the United States Code.

[27] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE 7 n.21 (3d ed. 1992).

guarantees of the Bill of Rights are generally available to service members, the application of those guarantees in the military setting differs considerably from the manner in which they apply in civilian society.[28]

Limited judicial review of military personnel policies does not provide a legal basis for congressional indifference to the rights of military personnel. As the Supreme Court has noted:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . . but the tests and limitations to be applied may differ because of the military context . . .[29]

Differences in constitutional rights between the armed forces and civilian society have existed from the days of the Revolutionary War, through the formation of the Constitution, to the present. Throughout our history, members of the armed forces have been subjected to controls and regulations that would not have been tolerated in civilian society.

These limitations do not mean that Congress expects military commanders to exercise their authority in an arbitrary and capricious manner. There are numerous laws and regulations governing military service which provide service members with protections against abuse and which establish means of redress.[30] These laws have been carefully crafted to maintain the delicate balance between individual concerns and the needs of the armed forces. While the nature of military service has changed over time, the fundamental precept—that the rights of the individual service member must be subordinated to the needs of national defense—remains unchanged.

Members of Congress are mindful of the admonition of the Supreme Court that Congress is not free to disregard the Constitution when dealing with military affairs. As the Court noted in *Rostker v. Goldberg*, "Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States."[31] For example, when the Senate Armed Services Committee considers a military practice or proposal in which military personnel would not be provided with the same rights as their civilian counterparts, the Committee carefully assesses the military necessity for any difference in treatment, and gives careful consideration to a wide range of views.[32]

Congress has played a leading role in enhancing the rights of members of the armed forces. Congress has enacted the Uniform Code of Military Justice,[33] established an independent civilian tribunal, the United States Court of Military Appeals, to review court-martial cases,[34] authorized the appeal of specified military justice cases directly to the Supreme Court,[35] enhanced procedural rights in the promotion process,[36] expanded opportunity for wearing religious apparel while in uniform,[37] and provided protections for military whistleblowers.[38] It is noteworthy that these rights have been established as a result of congressional oversight of military personnel practices, not as a result of judicial intervention.

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[28] For a discussion of Supreme Court decisions bearing on the relationship of the military and due process safeguards, *see* Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

[29] *Rostker*, 453 U.S. at 67.

[30] Such protections include but are not limited to Article 138, which grants the right of a service member "who believes himself wronged by his commanding officer . . . to complain to any superior officer" in seeking redress, 10 U.S.C. § 938 (1988); the right of a service member to communicate with a member of Congress or an Inspector General, without incurring retaliatory action, 10 U.S.C.A. § 1034 (West 1994); and the right of a service member to seek from the Secretary of Defense a correction of military records, 10 U.S.C. § 1552 (1988).

[31] *Rostker*, 453 U.S. at 64.

[32] As the Committee noted in its discussion of proceedings on the policy concerning homosexuality in the armed forces:

> The testimony presented to the Committee represented a wide range of experiences, including those of current and former servicemembers who have publicly identified themselves as gay or lesbian. The committee received a broad variety of views, ranging from recommendations to reinstate the policy in effect prior to the January 29, 1993 interim modifications to recommendations for elimination of restrictions on homosexual acts. The committee carefully considered all points of view in developing its recommendations.

S. REP. No. 112, 103d Cong., 1st Sess. 270 (1993).

[33] The Uniform Code of Military Justice is codified at 10 U.S.C.A. §§ 801-946 (West 1994).

[34] 10 U.S.C.A. §§ 941-946 (West 1994).

[35] 10 U.S.C.A. § 867a (West 1994).

[36] 10 U.S.C.A. §§ 611-618 (West 1994).

[37] 10 U.S.C. § 774 (1988).

[38] 10 U.S.C.A. § 1034 (West 1994) (ensuring a prohibition of retaliatory personnel actions resulting from communication with a member of Congress or Inspector General). In 1991 Congress instructed the Secretary of Defense to "prescribe regulations prohibiting members of the Armed Forces from taking or threatening to take any unfavorable personnel action . . . as a reprisal against any member of the Armed Forces for making or preparing a lawful communication to any employee of the Department of Defense." National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 843, 105 Stat. 1290, 1449 (codified as a statutory note to 10 in U.S.C.A. § 1034 (West 1994)).

Concluding Observations

Today, over two and a half million men and women serve in the armed forces in an active or reserve capacity. The overwhelming majority of these individuals serve with dignity and honor. Their service, as exemplified by the performance and conduct of our active and reserve forces during the Persian Gulf conflict, is a source of pride to all Americans.

These men and women come from many different walks of life. In the armed forces, they learn to put aside their differences and form cohesive military units, capable of serving under conditions of extreme hardship, and willing to make the ultimate sacrifice for our Nation.

Congress, working with the Executive Branch, has developed a system of military criminal and administrative law that carefully balances the rights of individual service members and the needs of the armed forces. The system has demonstrated considerable flexibility to meet the changing needs of the armed forces without undermining the fundamental needs of morale, good order, and discipline. The principles of judicial review developed by the Supreme Court recognize the fact that over the years Congress has acted responsibly in addressing the constitutional rights of military personnel. These principles have continuing validity as a guide for judicial review of military cases.

USALSA Report

United States Army Legal Services Agency

Litigation Division Note

Litigation Reports: The Foundation of Civilian Personnel Litigation Case Preparation

It is axiomatic that the plaintiff's judicial complaint is the starting point of each action that the Army Litigation Division handles. For civilian personnel litigation, however, the productive work on the complaint cannot begin until after the labor counselor in the field prepares the litigation report. The Civilian Personnel Branch of Litigation Division (DAJA-LTC, or LTC) relies on the litigation report to provide the foundation for the defense of Army interests. In a number of cases, the litigation report is the first work that the Assistant United States Attorney (AUSA) sees from the Army. This report must reflect the quality of work that the AUSA can expect to see from the Judge Advocate General's Corps. The importance of the litigation report cannot be overstated in the preparation of the Army's defense.

After service of the summons and complaint in a judicial action, the Army has sixty days to file either an answer or a dispositive motion. The Chief, Civilian Personnel Branch, requests the litigation report on receipt of a copy of the plaintiff's judicial complaint (generally about a week to ten days after the Secretary of the Army is served). A suspense of three or four weeks is provided to the labor counselor at or near the installation from which the cause of action arises. This leaves the litigation attorney assigned to the case approximately two weeks to read the report, consider the appropriateness of dispositive motions or an answer, prepare the necessary response and then forward the response to the AUSA for review before the answer is due. Accordingly, time is valuable and a properly prepared litigation report is essential. Following are several tips for the labor counselor assigned to prepare a litigation report.

Telephonic Discussion of the Case

When a litigation report request is received, the labor counselor should contact the named Army litigation attorney to discuss the case. Early coordination between the labor counselor and the litigation attorney may greatly assist the litigation strategy preparation. If the labor counselor is aware of facts that possibly could result in disposing the case early (such as timeliness issues or failure by the plaintiff to exhaust the available remedies administratively), then an immediate call to discuss the case is essential. Early discussions with the litigation attorney also may reduce the size and scope of the litigation report needed from the labor counselor. For example, some litigation attorneys do not require a memorandum of law or the full number of copies that *Army Regulation (AR) 27-40*[1] requires.

Labor counselors should volunteer opinions about the case freely and not wait for questions from the LTC. The labor counselor has better knowledge of the facts of a particular case, the witnesses, the exhibits, and the working environment

[1] DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION (19 Sept. 1994).

than the litigation attorney. If fact-specific nuances to a case exist, the labor counselor should bring them to the litigation attorney's attention; the LTC welcomes suggestions.

Statement of Facts

This is the most important part of the litigation report. A well thought out statement will include a brief command perspective of the complaint, followed by a chronology of any administrative processing, and then a detailed exposition of facts. The importance of this portion of the litigation report cannot be overemphasized. Do not merely copy the facts as noted in prior investigations or hearings (*e.g.*, the Equal Employment Opportunity Commission's factual background statement routinely is *not* a useful statement for litigation purposes). Support facts by specific reference to documents or witness statements located in the report.

If one of the exhibits to the report contains a fact mentioned in the statement of facts, reference the specific page and paragraph of the exhibit so that the fact may be found quickly. If this cannot be accomplished, make a separate copy of the supporting document and attach it as an exhibit to the statement of fact. Facts that are important, but unsubstantiated, most likely will require a subsequent request by the litigation attorney for proof in the form of a preexisting document or an affidavit. Facts that cannot be substantiated are of little, if any, value.

> Example: The plaintiff first contacted an EEO counselor on October 4, 1991, fifty-seven days after she discovered that she was nonselected. *(Plaintiff's USACARA Testimony, USACARA Report TAB 1, at 143; EEO Chronology Sheet, TAB 2)* On March 21, 1992 the USACARA investigator found no discrimination. *(USACARA Findings and Recommendations TAB 3, page 4)* On August 26, 1992, after receiving testimony from nine witnesses, the EEOC Administrative Judge (AJ) found no prima facie case of discrimination based on reprisal. *(AJ EEOC opinion TAB 4, page 7)*

Reference to specific documents in the file is crucial to the understanding and effective use of the report. Inform the litigation attorney immediately if documents are missing, or were not created. If a statement of facts is well written, then the litigation attorney should be able to incorporate the statement of facts into a motion to dismiss or a summary judgment brief with little or no editing.

Draft Answer

The labor counselor should prepare a draft answer for the litigation report suitable for submission to the court. If a response to a specific paragraph in the plaintiff's judicial complaint is ambiguous, then the labor counselor should include a supplemental explanation so that the litigation attorney and the AUSA can consider the response. If you are not comfortable with a standard response then explain the issue and why you are not comfortable with the standard response. These explanations to the litigation attorneys should be in a separate paragraph after the recommended response, or should be footnoted.

Witness List

Do not underestimate the number of witnesses. Include all possible witnesses on the list. *Army Regulation 27-40* requires a summary of the potential testimony that the witness can provide.[2] This is an important but often ignored or forgotten requirement. If the witness has a potential bias against the Army, inform the litigation attorney of the source of the bias (for example the LTC should know that the witness has filed thirty-seven grievances against her supervisor).

Witness lists need to contain the current address and telephone number of witnesses. Potential witness information is "core information" required by Executive Order Number 12,778 (Civil Justice Reform).[3] Often the litigation report contains stale information about government witnesses. When contact with a witness is not possible, state this in the report and explain the effect that not being able to use this person's live testimony has on the case. Reference all alternatives to this person's testimony and attach and clearly reference copies of these alternatives.

Consider listing character witnesses. Identify individuals who can bolster government witnesses' credibility once attacked and those that can undermine the plaintiff and the plaintiff's witnesses.

Case File

Provide documentation from the earliest moment that the plaintiff raised an issue about the allegations in his judicial complaint. Provide all precomplaint counseling documentation that is readily available so that it may be evaluated for timeliness and exhaustion defenses. Evidence that the plaintiff received proper counseling and notice of appeal rights should be provided in every case. When available, provide certified copies of return receipts ("green cards").

Take steps to ensure that original documents are maintained past any established destruction dates in accordance with *AR 27-40*.[4] "Flag" plaintiff's personnel file to help ensure that it does not disappear. When plaintiff's records have been forwarded to storage, make requests for them. Detail these and any other unusual facts in the report.

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[2] *Id.* para. 3-9e.

[3] *See id.*

[4] *Id.* para. 3-10.

The LTC often uses alternative defenses to better ensure that the Army's interests are being protected. It may be clear to everyone (except, perhaps, the judge) that one defense or the other should prevail. Because we cannot read a judge's mind, the LTC will submit a number of defenses in the alternative. When preparing a litigation report, aggressively pursue documentation that will support all defenses, not just the single most obvious one.

Copies

Army Regulation 27-40 requires forwarding the original litigation report and one copy to the Litigation Division.[5] Additionally, one copy goes to the United States Attorney's Office. Some litigation attorneys require only that the original be sent along with a copy to the AUSA. Any number of copies less than those required by the regulation (*i.e.*, three) must be cleared with the individual litigation attorney. Tab and clearly identify all copies mailed to this office.

Information Highway

The litigation division and all United States Attorney Offices use WordPerfect (version 5.1) word processing software. Forward a floppy disk with the litigation report so the litigation attorney can take advantage of the professional work product received from the field. *Army Regulation 27-40* encourages the transfer of data via some form along the information highway.[6] The LTC can receive information via direct Procomm link or via an upload to the Labor and Employment Law Conference of the Legal Automated Army-Wide System Bulletin Board System (LAAWS BBS) when time permits. Unfortunately, because of the urgency of most items, overnight mail generally is the rule.

Continuous Communication

The labor counselor's role in defensive federal litigation does not end with the submission of the litigation report. The litigation attorney will need your continuing assistance throughout the litigation, especially during discovery. The free flow of information and ideas throughout the pendency of a case is critical. The litigation attorney needs to know about any subsequent events that could have a bearing on the instant litigation (*e.g.*, that the plaintiff filed another administrative Equal Employment Opportunity complaint or a witness has relocated). As your partner, the LTC promises to keep you informed at all critical junctures and to provide the best defense we can. Major Harry and Major Ray.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin* (*Bulletin*), designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 2, number 2) is reproduced below:

Clean Air Act (CAA)

Department of Defense (DOD) Policy on Transportation Incentives

The Federal Employees Clean Air Incentives Act[7] authorizes federal agencies to use appropriated funds to provide military and civilian employees with "transit passes."[8] On 24 October 94, the Assistant Secretary of Defense for Force Management issued a policy memorandum superseding prior DOD policy memoranda that had precluded the payment of transportation incentives (*including transit passes*) to DOD employees under any circumstances.[9] The new DOD policy allows the military departments to provide transportation incentives authorized under Public Law 103-172 "to comply with Federal, state, and local air pollution control and abatement requirements."[10] The policy further provides that installations and activities must provide the same incentive to "all civilian employee and military member recipients."[11] The new policy raises practical and policy issues that must be resolved prior to implementation by the military services. The Services Steering Committee for CAA Implementation has established a work group to develop uniform implementing guidance. The best estimate is that implementing guidance will be approved sometime in the first half of 1995. Major Teller.

Restoration Advisory Boards

A new policy jointly issued by the DOD and the Environmental Protection Agency (EPA) increased the opportunity for community involvement with Army installation restoration activities through the creation of restoration advisory boards

[5] *Id.* para. 3-9g.

[6] *Id.*

[7] Pub. L. No. 103-172, 107 Stat. 1995 (current version at 5 U.S.C.A. § 7905 (West 1994)).

[8] *See* Environmental Law Div. Notes, ARMY LAW., June 1994, at 50.

[9] Memorandum, Assistant Secretary of Defense for Force Management, subject: Transportation Incentives (24 Oct. 1994).

[10] *Id.*

[11] *Id.*

(RABs). These guidelines complement provisions in the Fiscal Year 1995 DOD Authorization Act and apply to all continental United States military installations.

Restoration advisory boards operate similarly to technical review committees (TRCs) and advise the installation commander on issues including:

- identifying environmental restoration activities and projects at the installation;
- monitoring progress of these activities and projects;
- collecting information regarding restoration priorities for the installation;
- land use, level of restoration, acceptable risk, and waste management and technology development issues related to environmental restoration at the installation; and
- developing environmental restoration strategies for the installation.

Composition

A RAB consists of members of the local community as well as representatives from the DOD, the state, and the EPA. The installation commanding officer selects community members—after consulting with the EPA and the state—to "reflect the unique mix of interests and concerns within the local community." The DOD representation should consist of one or two members. The total number of members will vary depending on the diversity of a particular community's interests.

Existing TRCs are to be expanded or modified to become RABs rather than create separate committees. Converting a TRC to a RAB includes adding a community co-chair, increasing community representation, and making all meetings open to the public.

Funding

Restoration advisory boards are eligible for funds from several sources. Routine administrative expenses may be paid from installation Operations and Maintenance Funds, the Defense Environmental Restoration Account (DERA) for active bases, or the Defense Base Closure Account 1990 for closing bases.

Private sector participation shall be funded through CERCLA §117(e) technical assistance grants for installations on the National Priority List, DERA in the case of active installations, or BRAC in the case of closing installations. Private individuals on a RAB or TRC who are not potentially responsible parties and live in the vicinity of the installation may use these funds to obtain technical assistance in interpreting scientific and engineering issues with regard to the nature of environmental hazards at an installation and the restoration activities proposed for or conducted at the installation as well as to participate more effectively in environmental restoration activities at the installation. Any member of the RAB or TRC may use these funds to employ technical or other experts in accordance with regulations yet to be issued. Mr. Kohns.

California Desert Protection Act of 1994

Prior to its October adjournment, Congress passed the long-pending California Desert Protection Act of 1994 (CDPA). The CDPA establishes one new national park, expands two others, and also designates approximately eight million acres of federal lands as wilderness. The land will be managed by a variety of agencies within the Department of Interior.

While the CDPA withdrew some public lands and reserved them for use by the Navy, the CDPA does not include any lands currently being considered for expansion of the National Training Center at Fort Irwin. Although there was debate about restricting overflights of military aircraft over the area, the final version of the statute contains no such provisions. Major Fomous.

Oil Pollution Act of 1990 (OPA)

In the December 1994 issue of *The Army Lawyer*, I provided information concerning facility response plans (FRPs) and the OPA. I was recently contacted by the Army Environmental Center about whether a decision not to prepare an FRP had to be documented.

As previously indicated, the EPA has issued a final rule amending 40 C.F.R. part 112.[12] The rule created part 112.20, which addresses FRPs. Pursuant to 112.20(a)(2), an FRP is required for any facility that satisfies the criteria of 112.20(f)(1). These criteria are outlined in the December 1994 Environmental Law Division Notes.

Additionally, 112.20(e) provides that if a facility determines that, based on the criteria at 112.20(f)(1), an FRP is not required, then a certification form contained in appendix C of the rule shall be completed and maintained at the facility.

Please share this information with the appropriate personnel in your installation environmental office. Major Saye.

[12] 59 Fed. Reg. 34,070-136 (1994).

Reorganization of Environmental Law Division

On 25 October 1994, the United States Army Environmental Law Division reorganized into three branches. The new branches and respective branch chiefs are:

Litigation Branch	LTC Jim Currie
Restoration and Natural Resources Branch	Mr. Steve Nixon
Compliance Branch	MAJ David Bell

A listing of branch personnel and their areas of responsibility appears below. The voice and facsimile telephone numbers remain the same:

Voice: (703) 696-1230 or DSN 226-1230
Facsimile: (703) 696-2940 or DSN 226-2940

Environmental Law Division Organization

POSITION	*GRADE*	*NAME*
Chief, Environmental Law Division	COL	COL WilliamMcGowan
LITIGATION BRANCH		
Chief	LTC	LTC James Currie
Senior Litigation Attorney	GS14	Mr. Gerald Kohns
Litigation Attorney	MAJ	MAJ Garry Brewer
Litigation Attorney	MAJ	MAJ Michelle Miller
Litigation Attorney	MAJ	MAJ Sharon Riley
Litigation Attorney	MAJ	MAJ Mike Berrigan
Litigation Attorney	MAJ	CPT James Kraus
Litigation Attorney (Temporary; DERA-funded	GS13	Vacant
Litigation Attorney (DOJ Support @ RMA)	MAJ	CPT(P) Jonathan Potter
RESTORATION AND NATURAL RESOURCES BRANCH		
Chief	GS15	Mr. Steve Nixon
Environmental Attorney	MAJ	MAJ John Fomous
Environmental Attorney	CPT	MAJ Mike Corbin
Environmental Attorney (Temporary; DERA-funded)	GS13	Vacant
COMPLIANCE BRANCH		
Chief	LTC	MAJ David Bell
Environmental Attorney	MAJ	MAJ Joe Saye
Environmental Attorney	MAJ	MAJ Craig Teller
Environmental Attorney	CPT	CPT Tom Cook

Environmental Law Division Areas of Responsibility

SUBJECT	*PRIMARY*	*ALTERNATE*
Asbestos	MAJ Teller	MAJ Saye
BRAC/CERFA	MAJ Corbin	MAJ Fomous
CERCLA	Mr. Nixon	
Chem Demil	MAJ Bell	CPT Cook
Clean Air Act	MAJ Teller	MAJ Saye
Criminal Liability	CPT Cook	MAJ Bell
Cultural Resources	MAJ Fomous	
DAR Council	Mr. Nixon	
ECAS	Mr. Nixon	MAJ Fomous
Endangered Species	MAJ Fomous	
Fee/Tax	CPT Cook	MAJ Bell
Fines & Penalties	CPT Cook	MAJ Bell
Legislation	MAJ Saye	MAJ Teller
Litigation	Litigation Branch Attorneys	
Munitions	MAJ Bell	CPT Cook
Natural Resources	MAJ Fomous	
NEPA	MAJ Fomous	MAJ Corbin
OSHA	Mr. Nixon	MAJ Corbin
Overseas	MAJ Fomous	MAJ Corbin
Pollution Prevention	Mr. Nixon	MAJ Corbin
RCRA (incl OB/OD)	MAJ Bell	CPT Cook
Reserve Component	MAJ Saye	CPT Cook
Training	Mr. Nixon	MAJ Fomous
TSCA	MAJ Teller	CPT Cook
UST	MAJ Bell	CPT Cook
Water Rights/ CWA/SDWA	MAJ Saye	MAJ Teller

Faculty, The Judge Advocate General's School

Criminal Law Notes

Mistake of Fact Justifies Death of Civilian by Negating Unlawfulness Required for UCMJ Article 118(3)

Introduction

"A soldier who kills an intended target, thinking it to be an enemy soldier at the instant of firing, cannot be convicted, as a matter of law, of violating Article 118(3) of the Uniform Code of Military Justice"[1] (UCMJ). Every act that a soldier performs in combat is inherently dangerous and calculated to harm the enemy. A soldier always intends to kill or incapacitate the intended target, aims his or her weapon at the target or in its general vicinity, and knows that death or great bodily harm is a probable consequence of his or her actions.

The only circumstances that makes this conduct acceptable, lawful, and reasonable is that of lawful combat and the soldier's belief that he or she is striking at a combatant. Consequently, in combat, a mistaken belief as to the identity or status of a target would negate the state of mind required to commit the offense of murder pursuant to Article 118(3).[2]

In *United States v. McMonagle*,[3] the United States Court of Military Appeals (COMA) reversed the United States Army Court of Military Review's (ACMR) holding[4] that a combatant's mistaken belief as to a target's identity would not negate the element of unlawfulness. The reversal also clarified the state of mind necessary for a murder pursuant to UCMJ Article 118(3).[5] These findings restored a combatant's defenses of mistake and justification in conformity with the traditional laws of war.[6]

Statement of Facts

The charges resulted from an incident in which a Panamanian citizen was killed during the 7th Infantry Division's deployment in Operation Just Cause.[7] On January 25, 1990, Private First Class (PFC) Mark F. McMonagle's unit, B Company, 5th Battalion, 21st Infantry, 2d Brigade, 7th Infantry Division (Light), occupied a school just south of the San Miguelito area of Panama City, Panama. Company B was patrolling its assigned area to interdict terrorist and criminal activities.[8] Numerous incidents of hostile fire occurred and thousands of weapons were seized.[9] The events of the evening that led to the charges against PFC McMonagle unfolded in two distinct phases.

Phase I: Actions Involving Sergeant (SGT) Finsel, PFC Gussen, and PFC McMonagle

At approximately 1600 on January 25, 1990, PFC Marc M. Gussen, PFC McMonagle, their squad leader, SGT Paul T. Finsel, and other members of their unit gathered in a room to play cards and relax.[10] Sergeant Finsel suggested that they purchase some liquor and offered to pay half the purchase price.[11] Sergeant Finsel dispatched some members of the squad to buy the liquor.[12]

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[1] 34 M.J. 852, 871 (A.C.M.R. 1992) (Johnston, J., dissenting).

[2] *See, e.g.*, United States v. Calley, 46 C.M.R. 1131, 1179 (A.C.M.R. 1973) (holding that "to be exculpatory, the mistaken belief must be of such a nature that the conduct would have been lawful had the facts actually been as they were believed to be.").

[3] United States v. McMonagle, 38 M.J. 53 (C.M.A. 1993). On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces. The same Act also changed the names of the various Courts of Military Review to the Courts of Criminal Appeals. For the purpose of the practice notes, the title of the court that was in place at the time that the decision was published will be used.

[4] *McMonagle*, 34 M.J. at 852.

[5] *McMonagle*, 38 M.J. at 60. "[A] person should not be convicted of depraved heart murder 'unless he was subjectively aware of the risks he created.'" *Id.* (citing Milhizer, *Murder Without Intent: Depraved Heart Murder Under Military Law*, 133 MIL. L. REV. 210 (1991)); *see also* W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.4 at 204-05 (1986).

[6] *See infra* notes 101-155 and accompanying text for a discussion of the laws of war and the defenses of mistake and justification.

[7] *McMonagle*, 34 M.J. at 855.

[8] *Id.* at 856.

[9] *See* Record of Trial at 329, United States v. McMonagle, (General Court-Martial, convened by Commander, Headquarters, 7th Infantry Division (Light) Fort Ord, California) (29 May 1990) (verbatim record of trial) [hereinafter Record].

[10] *McMonagle*, 34 M.J. at 856.

[11] *See* Michael E. Ruane, *Boy Soldiers*, INQUIRER, Mar. 21, 1993, 22, at 25 [hereinafter *Boy Soldiers*].

[12] *Id.*

When the soldiers returned with the liquor, SGT Finsel, PFC Gussen, PFC McMonagle, and the others were playing cards and drinking.[13] At about 2030, some of the soldiers suggested that they get something to eat.[14]

The soldiers decided to go to a nearby McDonald's restaurant. Soldiers were permitted to leave the camp only with the chain of command's express authorization, fully armed, and in a group containing a noncommissioned officer. Sergeant Finsel obtained permission from his section sergeant to lead PFC McMonagle and PFC Gussen to the McDonald's.[15] In addition to carrying their assigned M-16 rifles, SGT Finsel was armed with a nine-millimeter Beretta pistol.[16]

Enroute to the McDonald's, SGT Finsel informed PFC Gussen and PFC McMonagle that they were going to go to a nearby bar and brothel called the Villa Fenix.[17] On arriving, PFC McMonagle and PFC Gussen felt uncomfortable about being at the club. Noticing their uneasiness, SGT Finsel ordered them to ground their weapons and equipment.[18] Private First Class Gussen and PFC McMonagle then went into the back of the club with some women.[19] Sergeant Finsel sat at a table while watching the equipment and drinking beer.[20]

Sergeant Finsel left the weapons and equipment at the table and went to a back room with a Panamanian woman.[21] On returning and rejoining his squad members, someone in the bar told them that a military police patrol was passing nearby.[22] At SGT Finsel's direction, the three soldiers hurriedly collected their equipment and moved to a room behind the bar.[23]

Approximately fifteen minutes later, after the squad returned to the bar area, SGT Finsel checked his equipment and realized that his nine millimeter pistol was missing.[24] In fear, all three soldiers chambered rounds in their M-16s.[25] Sergeant Finsel ordered PFC Gussen and PFC McMonagle to search for the pistol.[26]

Sergeant Finsel panicked as the squad's search of the bar premises and parking lot failed to turn up the missing weapon.[27] Both PFC Gussen and PFC McMonagle told SGT Finsel that they should return to the company area immediately and inform the chain of command of what had transpired.[28] Sergeant Finsel refused.[29]

Cognizant of his sole responsibility for the loss of the weapon, SGT Finsel ordered "that [the] weapon has to appear"[30] or that they would "have to come up with a story" to explain its loss.[31] The trio then stopped and searched vehicles on the street and frisked their occupants, without any success.

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[13] *McMonagle*, 34 M.J. at 856.

[14] *See Boy Soldiers*, *supra* note 11, at 25.

[15] *See* United States v. Finsel, 33 M.J. 739, 741 (A.C.M.R. 1991). Sergeant Finsel "falsely represented to the platoon sergeant that they were going to a nearby McDonald's restaurant for some food."

[16] The nine millimeter Beretta pistol was the company commander's assigned weapon. *Id.* at 741 n.2. Several days earlier, the company commander loaned his pistol to SGT Finsel because it was better suited for the building clearing operations in which SGT Finsel was engaged. *Id.*

[17] Record, *supra* note 9, at 95.

[18] *Id.* at 184. Private First Class Gussen testified that SGT Finsel told him to put his "weapon down" and that he (SGT Finsel) "would take care of it." *Id.*

[19] *Id.*

[20] United States v. McMonagle, 34 M.J. 852, 856 (A.C.M.R. 1992). Sergeant Finsel removed the pistol and showed it to two Panamanians.

[21] United States v. McMonagle, 38 M.J. 53, 55 (C.M.A. 1993).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Record, *supra* note 9, at 198-99. The soldiers knew that at a minimum, the bar bouncer and the person who stole the pistol were armed. *Id.*

[26] *Id.* at 186.

[27] "A frantic search of the area ensued." United States v. Finsel, 33 M.J. 739, 741 (A.C.M.R. 1991).

[28] *See* Record, *supra* note 9, at 355, Prosecution Exhibit 5, at 1 (sworn statement of PFC Mark McMonagle, Jan. 26, 1990) [hereinafter Prosecution Exhibit 5]; *see also id.* at 365 (sworn statement read into the record).

[29] *Id.* In an interview provided after his court martial, SGT Finsel stated that the loss of the weapon "pushed [me] right over the edge." *See Boy Soldiers*, *supra* note 11, at 25.

[30] Record, *supra* note 9, at 198.

[31] Prosecution Exhibit 5, *supra* note 28, at 1.

Sergeant Finsel instructed PFC Gussen and PFC McMonagle to say that they took drive-by fire while enroute to the McDonald's.[32] Sergeant Finsel decided that he would claim that he lost the pistol in an engagement.[33] Following SGT Finsel's lead, PFC Gussen and PFC McMonagle fired their M-16 rifles into the air.[34] All three then ran back towards the company area.[35]

Prior to reaching the company area, they met a reaction force of soldiers sent to investigate the gunfire. Private First Class Gussen returned to the company headquarters building. The remaining soldiers regrouped on the main street. As SGT Finsel told his story to the soldiers from the company, several soldiers, including Corporal (CPL) Tommy Lee Jones, smelled alcohol on SGT Finsel's breath and thought he was drunk.[36]

The company commander, Captain (CPT) John Sieder, arrived a few minutes later. Sergeant Finsel reported to CPT Sieder and related the false scenario.[37]

Phase II: The Security Mission

After assessing the situation, CPT Sieder ordered SGT Finsel, SGT Timothy Verrender, and others, including PFC McMonagle, to provide "rear security to cover the company's withdrawal to the school" and to maintain surveillance on the immediate area.[38] When SGT Verrender returned to the command post, CPT Sieder apparently reconsidered his decision to leave SGT Finsel in charge of the security team and ordered SGT Verrender to return to the rear security team and retrieve SGT Finsel.[39]

As SGT Verrender returned to find SGT Finsel, he heard new gunfire and observed tracer rounds going over a nearby three-story apartment building.[40] Mr. Nicholas Alba, who lived in the building, testified that he heard gunfire coming from the apartment above his.[41] One Panamanian soldier and two women testified that they saw shots fired from a vehicle.[42]

Under the operational control of SGT Finsel, PFC McMonagle began maneuvering, along with other soldiers, up the street to where they thought the gunfire originated.[43] It was dark out and visibility was limited. The sound of firing continued to reverberate down the street, making it difficult for the soldiers to pinpoint its source or to hear shouted commands.

Sergeant Finsel was firing wildly, directing rounds at various targets in alley ways and buildings.[44] Separately, SGT Clifford Miller and CPL Jones saw rounds directed at them being fired from the top of a building.[45] Certain that someone was on the roof shooting at them and that they were in a fire fight, CPL Jones returned fire.[46] Sergeant Finsel also directed PFC McMonagle to fire at the top of the building[47] and he did as ordered.[48] Private First Class McMonagle then joined others to canvass nearby alleys to locate an avenue to reach the suspected location of the firing.

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[32] *See* United States v. Finsel, 33 M.J. 739, 741 (A.C.M.R. 1991), where the court established that SGT Finsel "*devised* a plan to cover up the loss of the pistol by staging a fire fight." (emphasis added).

[33] Private First Class Gussen testified that "Sergeant Finsel would have gotten in a lot of trouble for it, so Sergeant Finsel came up with the idea to hide the loss of the pistol." *Id.* at 739 n.3.

[34] United States v. McMonagle, 38 M.J. 53, 55 (C.M.A. 1993).

[35] *Id.*

[36] Record, *supra* note 9, at 270. "To several of his fellow noncommissioned officers, [SGT Finsel] appeared to be slurring his words and was 'freaked out' or drunk." *Finsel*, 33 M.J. at 741.

[37] Record, *supra* note 9, at 334. At trial, CPT Sieder testified that he did not suspect that SGT Finsel was intoxicated. *Id.*

[38] *McMonagle*, 38 M.J. at 55.

[39] *Id.*

[40] *Id.*

[41] Record, *supra* note 9, at 423.

[42] *Id.* at 418-20, 422.

[43] *Id.* 216-17.

[44] *Id.* at 289. Over a period of time—estimated by various individuals to be from one-and-a-half to two hours in duration—SGT Finsel was observed firing all the time "almost at random—50, 60 rounds" (*Boy Soldiers*, *supra* note 11, at 29), "pretty sporadically," (Record, *supra* note 9, at 251) and "randomly" (*Id.* at 279).

[45] Record, *supra* note 9, at 245, 268, 278.

[46] *Id.* at 257, 278-79.

[47] *Id.* at 293-94.

[48] *Id.* at 251, 293.

During the shooting, Mrs. Leila Edith Panay was fatally wounded while standing in a bath enclosure next to her house. Her husband testified that she left their house for the bath located in the courtyard.[49] Mr. Panay, who was sitting at a small desk inside the house, testified that his wife was standing stationary in the bath area preparing to take a shower when the lights went out and shots were heard.[50] Mr. Panay testified that he was hit by a bullet and that he told his wife to get down but she did not.[51] During a subsequent volley of fire Mrs. Panay was hit by gunfire.[52]

Once Mr. Panay realized that his wife had been shot, he carried her into their house.[53] As he placed her onto the couch, an unidentified soldier ordered him outside[54] and he confronted several other soldiers, including SGT Verrender and PFC McMonagle. Mr. Panay screamed at SGT Verrender, "You shoot my wife, you kill my wife, they kill my wife."[55]

Sergeant Verrender observed Mrs. Panay lying face down eight to ten feet inside the Panay house.[56] Soldiers rendered assistance to both the Panays, questioned Mr. Panay, and attempted to calm him while they treated Mrs. Panay.[57] Sergeant Verrender ordered the soldiers to stay with Mrs. Panay while he went to investigate the continuing gunfire. Mrs. Panay was evacuated to the command post for further treatment and died shortly thereafter.

The Investigation

Lieutenant Colonel (LTC) Michael H. McCaffery, the 2d Brigade Surgeon, conducted an examination of the deceased and found a small caliber bullet hole which indicated that the round entered down into Mrs. Panay at about a forty-five degree angle.[58] At trial, he testified that the round had a relatively high entrance wound and had neither bounced nor altered its original trajectory.[59]

A search of the buildings and roofs in the area of the incident by soldiers revealed no weapons or shell casings. Armed with this information—and aware that SGT Finsel was drunk and had reported the loss of the pistol—CPT Sieder formed suspicions about the incident. At approximately the same time, a military police investigator (MPI) arrived to investigate the incident.

The MPI observed three or four holes in the rear wall of the Panay's house and that at least one round was imbedded therein.[60] The MPI also conducted a trajectory analysis of the path of the rounds and determined that at least one round had entered the courtyard after being fired from an unspecified location outside the courtyard and from a height of at least ten feet.[61] Directed by a superior to discontinue the investigation, the MPI departed leaving the incident scene unsecured.[62]

Approximately twelve hours later, an investigator from the Criminal Investigation Division (CID) arrived to assume responsibility for the investigation of the matter. The CID agent videotaped the incident location.[63] The video included shots of the Panay's wall which contained the bullet holes and the rounds previously located by the MPI. The CID agent failed to examine the bullet holes further, recover the rounds, or conduct any analysis of the trajectories.[64]

No rounds, including the one imbedded in the Panay's back wall, were recovered. Expended brass shell casings from PFC

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[49] *Id.* 303-05.

[50] *Id.* at 305.

[51] *Id.* at 307.

[52] *Id.*

[53] *Id.* at 309.

[54] *Id.* at 307.

[55] *Id.* at 219. Mr. Panay, who is almost blind without his glasses, was not wearing them during the incident. Consequently, he could not identify anyone present during the incident nor anytime thereafter. *Id.* at 309-10.

[56] *Id.* at 220-22.

[57] *Id.* 220-37.

[58] *Id.* at 296-7.

[59] *Id.* at 298.

[60] *Id.* at 408.

[61] *Id.* at 409-15.

[62] *Id.* at 410.

[63] *See id.*, Prosecution Exhibit 6 (Ampex 189 VHS Tape labeled: "RIO ABAJO JAN. 90 COPY 18:35 Min.").

[64] At trial, the agent's analysis consisted of the conclusion that fire entered the courtyard "toward the back wall . . ." *Id.* at 401.

McMonagle's and SGT Finsel's M-16s were collected, but the incident scene from which it was gathered had not been preserved.[65] As a result, the positions of PFC McMonagle and the other persons who fired could not be determined from the evidence. At least four other soldiers in the vicinity fired their weapons on the night of January 25, 1990, but none of their expended brass was produced at trial.

Criminal Investigation Division agents took a number of statements, including those of SGT Finsel, PFC Gussen, and PFC McMonagle. According to a pretrial statement that the government introduced against him, PFC McMonagle entered an alley as at least fifteen rounds were fired overhead and:

> I walked further in and saw rounds hit the rubble which was about a foot in front of me by now. I saw a shadow move across the building in front of me really fast. I said, "Alto, Alto" [Stop!, Stop!], and took my weapon off safe, put it on semi, and fired six pulls of the trigger.
>
> I put my weapon back on safe, ran up to where I shot the shadow. Not all the way, but close enough to see a man run out and say "my wife, my wife."
>
> . . .
>
> SFC Verrenda [sic] came over and started taking care of the person I hit.[66]

The CID investigator who took the pretrial statement asked PFC McMonagle whether he thought "*his rounds*" hit the shadow at which he aimed:

> Q. Do you think it was your rounds that hit the silhouette [shadow]?
>
> A. I don't know.[67]

Sergeant Eduardo E. Pagan confirmed that PFC McMonagle shouted "Alto" and that immediately thereafter tracer rounds were seen within the Panay's courtyard.

Statement of the Case

On May 29 and June 7, 18, 19, and 25 to 27, 1990, PFC Mark F. McMonagle was tried by a general court-martial composed of officer and enlisted members.[68] Private First Class McMonagle was tried for murder in violation of Article 118, UCMJ, conspiracy to obstruct justice in violation of Article 81, UCMJ, willful disobedience of a commissioned officer (three specifications) in violation of Article 90, UCMJ, obstruction of justice in violation of Article 134, UCMJ, and wrongful and willful discharge of a firearm in violation of Article 134, UCMJ. Regarding the allegation of murder, the charge sheet sets forth only a single charge and specification pursuant to Article 118:

> CHARGE III, VIOLATION OF THE UCMJ, Article 118
>
> SPECIFICATION: In that Private First Class (E-3) Mark F. McMonagle, 208-62-9929, U.S. Army, B Company, 5th Battalion, 21st Infantry, 2d Brigade, 7th Infantry Division (Light), Fort Ord, California 93941, did, at Panama City, Panama, on or about 25 January 1990, murder Leila Edith Dias Panay by means of shooting her with an M16A2 rifle.[69]

Private First Class McMonagle was formally arraigned on this confusing single murder charge.

Private First Class McMonagle was found guilty of murder, conspiracy to obstruct justice, willful disobedience of a commissioned officer (three specifications), obstruction of justice, and wrongful and willful discharge of a firearm.[70] Private First Class McMonagle was sentenced to a dishonorable discharge, confinement for seven years, total forfeiture of all pay and allowances, and reduction to Private E1. The convening authority reviewed and approved the sentence.

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[65] *Id.* at 396, 399, 400. Because the incident scene was left unsecured, the area from which the evidence was to be collected was swept. Shell casings and other debris were collected in piles. *Id.* at 400. Criminal Investigation Division agents ultimately located these piles when they arrived the next morning.

[66] Prosecution Exhibit 5, *supra* note 28, at 1.

[67] *Id.*

[68] *See* Record, *supra* note 9.

[69] *See id.*, Appellate Exhibit XXXIV (Charge Sheet) [hereinafter Charge Sheet]. The specification format is consistent with the model specification in the *Manual for Courts-Martial* (*Manual*), MANUAL FOR COURTS-MARTIAL, United States, pt. IV, para. 43(f) (1984) [hereinafter MCM] and the model specification located in the *Military Judge's Benchbook* (*Benchbook*), DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGE'S BENCHBOOK, para. 3-86 (1 May 1982), [hereinafter BENCHBOOK] used to charge violations of Article 118(2), UCMJ.

[70] *See* Charge Sheet, *supra* note 69.

On February 28, 1992, a majority of the ACMR affirmed the findings of the court-martial except for the convictions for willful disobedience (Article 90).[71] As to the specifications, the ACMR found sufficient evidence only of the lesser offense of disobedience of a lawful general order and other lawful orders in violation of Article 92.[72] The ACMR reassessed the sentence on the basis of the errors it recognized.[73] The ACMR affirmed so much of the sentence as provided for a dishonorable discharge, confinement for six years, forfeiture of all pay and allowances, and reduction to the grade of Private E1.[74]

Judge Johnston, dissenting, found that the government had failed to prove that PFC McMonagle was guilty of murder, and voted to dismiss the conviction under Article 118.[75] He also found that the findings concerning Article 118 were flawed and voted to remand the case on this error.[76]

The COMA granted review on two issues: (1) whether the record evidence was insufficient to prove that appellant shot the victim as part of a continuing ruse or hoax where, after being lawfully placed on security duty, he believed that he was confronted by the enemy; and (2) whether the military judge erred by neglecting to instruct the court-martial panel as to accident, mistake of fact, and mistake of law where there was a conceded basis for such instruction.[77]

On September 27, 1993, the COMA unanimously reversed the ACMR's decision.[78] Specifically, the findings were reversed as to Charge II and its specification (murder in violation of Article 118(3)).[79] The findings of guilty on the affected specification and the sentence were set aside. The matter was returned to The Judge Advocate General of the Army for action.[80]

The Judge Advocate General of the Army designated the Commander, United States Army Combined Arms Command and Fort Leavenworth as the convening authority, who was instructed "to take action in accordance with the Court's decision."[81] The convening authority reviewed the matter and decided that rehearing on the affected specification and sentence was impracticable.[82] A sentence of no punishment was approved.[83] Private First Class McMonagle's rights, privileges, and property were restored.[84]

Analysis

Jury Instructions

Although PFC McMonagle was formally arraigned on a single murder charge, the prosecution announced at trial that the government was proceeding on two alternative theories: (1) that PFC McMonagle intended to kill Mrs. Panay or inflict

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[71] *See* United States v. McMonagle, 34 M.J. 852 (A.C.M.R. 1992); *see also* companion cases United States v. Finsel, 33 M.J. 739 (A.C.M.R. 1991); United States v. Gussen, 33 M.J. 736 (A.C.M.R. 1991). A court may take judicial notice of the records of related matters. *See* United States v. Surry, 6 M.J. 800, 801 n.4 (A.C.M.R. 1978).

[72] *McMonagle*, 34 M.J. at 865. The ACMR found the evidence sufficient to establish the lesser offense of disobedience of a lawful general order and other lawful orders. *Id.* Accordingly, the ACMR affirmed a violation of Article 92(2) in each instance for the violations of the order not to consume alcohol (Charge I, specification 1) and the order not to consort with females (Charge I, specification 2). *Id.* The ACMR affirmed a violation of Article 92(1) for violation of the order not to chamber rounds (Charge I, specification 3). *Id.*

[73] *See* United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986).

[74] *McMonagle*, 34 M.J. at 866.

[75] *Id.* (Johnston, J. dissenting). Judge Johnston stated that the basis for his opinion was that the findings of the court-martial needed to be clarified. Id. Furthermore, Judge Johnston recognized that "the instructions from the military judge were deficient and prejudicial to the accused" and that the government's evidence "was factually insufficient to sustain the conviction of murder." *Id.*

[76] *Id.*

[77] A listing of issues not granted is as follows:

> (III) whether the findings of the ACMR failed to indicate the offense of which the accused was found guilty where the original findings sheet is annotated with unauthenticated writings; (IV) whether the military judge erred when he failed to direct the prosecution to elect under which of the mutually exclusive charges Article 118(2) or Article 118(3), the government would proceed; and (V) whether the individual or cumulative effect of four serious errors identified by the ACMR warrants reversal where substantial rights of the accused were effected.

Supplement to Petition for Grant of Review at i, United States v. McMonagle, (C.M.A.) (No. 68001/AR) (May 28, 1992).

[78] United States v. McMonagle, 38 M.J. 852 (A.C.M.R. 1993).

[79] *Id.*

[80] *Id.*

[81] Memorandum for Commander, United States Army Combined Arms Command & Fort Leavenworth, ATTN: ATZL-JA, Fort Leavenworth, Kansas 66027-5063, ¶ 3 (22 Oct. 1993).

[82] *See, e.g.*, United States v. Sala, 30 M.J. 813 (A.C.M.R. 1990) (sentence of no punishment should be approved where convening authority decides rehearing on sentence not practicable).

[83] *See* General Court Martial Order No. 8 (4 Mar. 1994).

[84] *Id.*

great bodily harm;[85] and (2) that PFC McMonagle engaged in an act inherently dangerous to others, and evidenced a wanton disregard for human life.[86] The military judge instructed the panel on both theories.

During the instructions hearing, defense counsel requested an instruction on the affirmative defenses of accident, mistake, and justification under murder two and murder three.[87] Although the military judge agreed to give the instruction on mistake of fact, he had difficulty in formulating the particular instruction that he would provide to the court-martial panel. After discussion with defense counsel, the military judge concluded:

> MJ: Well, based upon that, *I think as far as all of these murder charges and the lesser included, that I will advise the court that the killing of a human being is unlawful when done without legal justification or excuse. If the accused reasonably believed that this was an enemy that he was authorized to fire at, then the killing is not unlawful.*
>
> DC: Yes, sir.
>
> MJ: Even the fact that he misfires and kills someone else, you know, in any wartime situation that's a fact of combat. *You may fire at what you believe to be enemy and if you miss and hit somebody else or are mistaken, it's still justified.* Do you agree with that?
>
> DC: Yes, sir.[88]

The military judge's initial instruction to the members of the panel instructed them on the elements of murder under Article 118(2). After advising the panel that one of the elements of murder under Article 118(2) was "that the killing of Mrs. Panay by the accused was unlawful [,]" the military judge provided the following instruction:

> MJ: You are advised that the killing of a human being is unlawful when done without legal justification or excuse.
>
> You are further advised that if the accused honestly and reasonably believed that he was firing in response to an enemy or any other type of combatant, that his actions would be justified.[89]

The military judge provided additional instructions on proof of intent. He concluded his instructions on the elements of 118(2) by stating: "Now that's the offense of unpremeditated murder."[90]

The military judge initiated his instruction on Article 118(3) as follows:

> MJ: Another theory by which you may find the accused guilty of murder, in violation of Article 118, is murder while engaging in an act inherently dangerous to others.[91]

The military judge listed the elements of the offense including the element "that the killing of Leila Edith Dias Panay by the accused was unlawful."[92] He continued by defining an act "inherently dangerous to others" and showing "wanton disregard for human life."[93] The military judge omitted the instruction on justification previously provided for Article 118(2). The judge also did not instruct that the victim's death would not have been unlawful if PFC McMonagle had an honest and reasonable belief that the victim was a combatant.[94]

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[85] *See* UCMJ art. 118(2) (1984).

[86] *Id.* art 118(3). The shift in strategy first appeared to take place with the prosecutor's closing statement. In the opening, the prosecutor stated only that PFC McMonagle fired six shots at a moving target, one of which killed Mrs. Panay, and described PFC McMonagle as shooting the victim in "cold blood." Record, *supra* note 9, at 473. This description apparently referred to the originally specified charge pursuant to Article 118(2). At closing, the prosecutor expanded the charges, however, to include a specification under 118(3), describing PFC McMonagle's conduct as a cover-up to his trip to the bar. *Id.* at 448.

[87] Record, *supra* note 9, at 449-51.

[88] United States v. McMonagle, 38 M.J. 53, 57 (C.M.A. 1993).

[89] *Id.* at 58.

[90] *Id.* The COMA found that the effect of this instruction was to compartmentalize and separate the instructions on Articles 118(2) and 118(3). *Id.* at 61. "The net effect of the military judge's compartmentalized instructions was to tell the members that the special defense of justification based on an honest and reasonable mistake as to the identity of the victim was limited to Article 118(2)[.]" *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

The military judge instructed the members to vote separately on the alternative theories of murder.[95] However, the Findings Worksheet listed a single charge of a violation of Article 118(2). The "not guilty" portion adjacent to Charge II (the violation of Article 118) was lined out with a pen, indicating that PFC McMonagle was found guilty of the charge and specification (Article 118(2)).[96] A pencil annotation immediately under the lined-out portion states "Theory -2- while committing an act dangerous to others."[97]

The announcement of findings in open court did not clarify which theory, if either, that the panel chose when it convicted PFC McMonagle.[98] The ACMR construed the record to reflect a finding of guilt for a violation of Article 118(3).[99] The COMA evaluated the adequacy of the instructions provided at trial based on the facts of the case and the ACMR's findings.[100]

Justification and Mistake of Fact

At trial, the military judge erred in not instructing on defenses going to PFC McMonagle's state of mind: justification and mistake of fact or law. The majority of the ACMR affirmed, holding that an accused's mistaken belief is irrelevant under the instant facts.[101] The COMA reversed, however, finding that the trial judge's failure to instruct on mistake of fact and justification warranted setting aside the opinion.[102]

An accidental or justified killing may be intentional murder, manslaughter, or no crime at all.[103] An instruction on accident or mistake of fact is required when: (1) evidence exists that the accused was engaged in an act not prohibited by law; (2) that this act was shown by some evidence to have been performed in a lawful manner; and (3) that some evidence in the record of trial exists that this act was done with lawful intent.[104] Furthermore, "[t]he accused is entitled to a requested instruction on a theory of his case—if reasonably raised under the law and facts."[105] Failure to so instruct is reversible error.[106]

Finally, an affirmative or special defense is reasonably raised and must therefore be instructed on when "the record contains some evidence to which the military jury may attach credit if it so desires."[107] Only "some evidence" is required to trigger the judge's instructional duty.[108] Once a defense is placed in issue by some evidence, the prosecution has the bur-

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[95] *Id.*

[96] *Id.* (citations omitted). *See also* Charge Sheet, *supra* note 69.

[97] Charge Sheet, *supra* note 69.

[98] *See* MCM, *supra* note 69, R.C.M. 922(d) (Erroneous announcement). The military judge has the obligation to ensure that complete findings are announced. United States v. Johnson, 22 M.J. 945, 946 (A.C.M.R. 1986), *review denied*, 23 M.J. 253 (C.M.A. 1986). The court martial panel had the opportunity to convict PFC McMonagle of murder pursuant to Article 118(2) but declined to do so where an instruction as to mistake was provided. Because the results were not clarified in open court, it is not clear that Article 118(3) "provided the basis for the conviction returned by the' members . . ." United States v. Berg, 30 M.J. 195, 200 (C.M.A. 1990) (quoting United States v. Davis, 10 C.M.R. 3, 9 (C.M.A. 1953)).

[99] *See* UCMJ art. 66(c) (1984). The ACMR may affirm only such findings of guilty and the sentence or such part or amount of sentence, as it finds correct in law and fact and determines, on the basis of the entire record.

[100] *McMonagle*, 38 M.J. at 58.

[101] The majority of the ACMR stated: "We conclude further that the appellant's alleged mistaken belief that he was firing at an enemy combatant would not negate the element of 'unlawfulness.'" United States v. McMonagle, 34 M.J. 852, 864 (A.C.M.R. 1992).

[102] *McMonagle*, 38 M.J. at 60.

[103] Thomas v. United States, 419 F.2d 1203, 1206 (D.C. Cir. 1969).

[104] *See, e.g.*, United States v. Ferguson, 15 M.J. 12, 17 (C.M.A. 1983) (Everett, C.J., and Cook, J. concurring in result but requiring that instruction be granted when possibility raised that accused performed lawful act in lawful manner). The majority in *McMonagle*, 34 M.J. at 852, cited *Ferguson* for the proposition that appellant McMonagle was not entitled to an instruction on accident or mistake of fact. Its reliance on *Ferguson* to deny an instruction was misplaced. *Ferguson* teaches that if the evidence merely raises the possibility that the accused was performing a lawful act in a lawful manner, the accused is entitled to an instruction. *Ferguson*, 15 M.J. at 25. Specifically, *Ferguson* found that the accused testified that he merely wanted to scare his wife, stop her attacks, and that "everything that night happened pretty fast. *Id.* at 19. The court-martial panel members may have drawn an inference that an accident occurred where the judge or ACMR did not.

[105] *See, e.g.*, United States v. Sandoval, 15 C.M.R. 61 (C.M.A. 1954) (opinion by Chief Judge Quinn and Judge Brosman concurring in result of case based on specific facts but holding that accused is entitled to instruction on accident in situation raised by evidence).

[106] *See* United States v. Graves, 1 M.J. 50, 53 (C.M.A. 1975). "Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury *properly* is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law." *Id.* (emphasis added); United States v. Lofton, 776 F.2d 918, 920 (10th Cir. 1985) (reversible error).

[107] United States v. Bradford, 29 M.J. 829, 832 (A.C.M.R. 1989), *reconsideration denied*, 29 M.J. 1057 (A.C.M.R. 1990) (quoting United States v. Simmelkjaer, 40 C.M.R. 118, 122 (C.M.A. 1969)).

[108] United States v. Jackson, 12 M.J. 163, 166 (C.M.A. 1981). "[T]he military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law." *Graves*, 1 M.J. at 53.

den of proving beyond a reasonable doubt that the defense did not exist.[109] This evidence need not "be compelling or convincing beyond a reasonable doubt."[110]

Prosecution evidence may be sufficient to raise a special defense.[111] In the instant case, PFC McMonagle's pretrial statement admitted into evidence was sufficient for this purpose.[112] "Any doubt whether the evidence is sufficient to require an instruction should be resolved in favor of the accused."[113]

The COMA held that PFC McMonagle raised the interrelated defenses of justification and mistake of fact.[114] The COMA also found that the net effect of the military judge's charges was to instruct the panel that the special defense of justification and reasonable mistake as to the identity of the victim did not apply to the charge under Article 118(3). Specifically, the COMA discredited the argument advanced by the government and implicitly endorsed by the ACMR: that any soldier firing on the evening of January 25, 1990, and killing Mrs. Panay or any other noncombatant, would have been guilty of murder.[115]

The failure to properly instruct deprived PFC McMonagle of the opportunity to have his defense fully considered by the court-martial panel.[116] This failure prejudiced PFC McMonagle and established a mandatory presumption as to an element of intent necessary to convict him of murder under Article 118(3).[117]

At trial, the evidence supported, and defense counsel requested, an instruction on justification, accident, and mistake of fact or law. Nevertheless, the military judge's instructions removed the accused's defense of justification based on his honest and reasonable mistake as to the victim's status.

"A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful."[118] The duty may be imposed by statute, regulation, or order. "[K]illing an enemy combatant in battle is justified."[119]

Ignorance or mistake of fact is a defense to an offense where PFC McMonagle had, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as PFC McMonagle believed them to be, he would not be guilty of the offense.[120] If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only exist in the mind of the accused.[121]

Ignorance or mistake of law may be a defense in some limited circumstances.[122] A defense to an alleged violation exists if the accused—because of a mistake as to a separate nonpenal law—lacks the criminal intent or state of mind necessary to establish guilt.[123] The government conceded that PFC McMonagle properly had rounds chambered when he entered the courtyard in question.[124]

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[109] MCM, *supra* note 69, R.C.M. 916(b) (Burden of proof). More than one defense may be raised as to a particular offense. The defenses need not necessarily be consistent. *Id.*

[110] *Bradford*, 29 M.J. at 832 (quoting United States v. Jackson, 12 M.J. 163, 166 (C.M.A. 1981)).

[111] *See* United States v. Curtis, 1 M.J. 297, 298 n.1 (C.M.A. 1976) (accused's and prosecution witnesses' pretrial statements sufficient to raise special defense of self-defense).

[112] *See Bradford*, 29 M.J. at 832.

[113] United States v. Steinruck, 11 M.J. 322, 324 (C.M.A. 1981).

[114] Although the COMA recognized *McMonagle* raised the prerequisite elements for the special defense of accident, it concluded that the defense was not raised where the focus of the instruction was whether the accused "was honestly and reasonably mistaken about the identity of the person he shot" *instead of* the consequence of the accused's act. United States v. McMonagle, 38 M.J. 53, 59 (C.M.A. 1993). This interpretation ignores that all the evidentiary prerequisites were met, does not resolve a doubtful situation in the favor of the accused, and presupposes that Mrs. Panay was the target fired on by PFC McMonagle and that her death could have been expected. The facts of *McMonagle* result in the type of situation that the majority in *Ferguson* and *Sandoval* expressly state as when an accident instruction should be provided. *See supra* notes 104 to 108 and accompanying text for a discussion of when the COMA requires an instruction on accident to be provided.

[115] *See* United States v. McMonagle, 34 M.J. 852, 871 (A.C.M.R. 1992). At oral argument before the ACMR, government appellate counsel contended that Article 118(3) operated as a strict liability statute inasmuch as any soldier firing that evening at a perceived enemy and killing a noncombatant would be guilty of murder. *Id.* Had this erroneous view been permitted to stand, incidents of friendly fire or fratricide could have been charged as murder.

[116] *See* United States v. Van Syoc, 36 M.J. 461, 465 (C.M.A. 1993).

[117] *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510 (1979). *See also* MCM, *supra* note 69, R.C.M. 916(b) (Burden of proof).

[118] MCM, *supra* note 69, R.C.M. 916(c).

[119] *Id.* (see Justification Discussion).

[120] *Id.* R.C.M. 916(j) (Ignorance or mistake of fact).

[121] *Id.* An example of a mistake which need only exist in fact is ignorance of the fact that the person assaulted was an officer. *Id.* (Discussion).

[122] *Id.* 916(l)(1) (discussion on ignorance or mistake of law).

[123] *Id.*

[124] Record, *supra* note 9, at 166-67.

Rules of engagement are directives issued by competent authority to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and or continue combat engagement with other forces encountered. They are the means by which the National Command Authority and operational commanders regulate the use of armed force in the context of applicable political and military policy and domestic and international law.[125] The rules of engagement in effect on the evening of January 25, 1990, authorized PFC McMonagle to fire at a target that he believed to be the enemy.[126] Commentators on the Panamanian conflict have stated that rules of engagement changed, "depending upon political realities . . . almost daily."[127] Uncertainty as to the rules of engagement contributed to the confusion and lack of control manifested in *McMonagle*.[128] Rules of engagement in other military operations also have raised concerns.[129]

Arguably, the good faith belief of a combatant in the ability to chamber rounds or to fire in accordance with the rules of engagement vitiates any argument that he can be convicted of a violation of Article 118(3). At most, simple negligence in violation of Article 134, UCMJ, is involved.[130] Negligent homicide, based on this standard, is characterized as the absence of due care, that is, an act or omission of an individual who is under a duty to use due care but who exhibits a lack of that degree of care for the safety of others which a reasonably prudent person would have exercised under the circumstances.[131]

In *McMonagle*, the evidence reflects that PFC McMonagle acted reasonably when he challenged what he believed to be a hostile threat. He asked for permission to fire at hostile targets and ultimately received permission to engage from his squad leader.[132] Gunfire was directed in the direction of PFC McMonagle and rounds struck the ground directly to his front.[133] He took the precaution to challenge his target in Spanish.[134] "It is undisputed that [PFC McMonagle] did not intend to kill an innocent civilian."[135] At all times, PFC McMonagle reacted consistently to what a reasonable person would consider to be a life threatening and imminently dangerous situation.

Murder in Combat and the Requirement of Subjective Awareness Pursuant to the Laws of War

Under the laws of war, international law, decisions of federal courts, and the COMA, it may be difficult to successfully prosecute a soldier acting under lawful orders with homicide if the soldier reasonably carries out those orders.[136] A soldier, acting under lawful orders, who shoots a civilian while responding to hostile fire in a combat zone, cannot necessarily be said to possess the intent necessary for a conviction of murder.[137]

A review of the legislative history of Article 118(3), the discussion of the offense in the *Manual*, and the case law applicable to the clause "intent to kill or inflict great bodily

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[125] DEP'T OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 317 (1 Dec. 1989).

[126] As stated in Major General Carmen J. Cavezza's Order of 19 January 1990, United States Army forces were authorized to chamber rounds when "enemy and/or criminal contact is imminent" and keep the weapon on safe "until visual sighting of the target has been made."

[127] Major Robert G. Boyko, *Just Cause Mount Lessons Learned*, INFANTRY, May-June 1991, at 28, 30. Major Boyko opined that "[t]he fastest way to get into trouble (except for fratricide) was to violate one of [the rules of engagement]." *Id.* at 30-1.

[128] In *McMonagle*, everyone testified to a different understanding of the stated rules of engagement. In contrast to the language contained General Cavezza's order, CPT Sieder testified that he informed soldiers in his company that he interpreted the phrase "imminent threat" to mean rounds could be chambered where a soldier "heard rounds being fired." Record, *supra* note 9, at 332-33. Sergeant Cavallo's understanding was that soldiers could chamber rounds in "self-defense or defense of other personnel who appeared to be in immediate danger." *Id.* at 144. Private First Class Gussen's understanding was that the rules permitted chambering of rounds "if there was a threat to [soldiers'] lives or to any civilians' lives . . . ." *Id.* at 179. Sergeant Finsel, PFC Gussen, and PFC McMonagle only chambered rounds after they became aware that someone in the bar was in possession of the weapon lost by SGT Finsel. *See supra* notes 23-25 and accompanying text (discussing events that triggered the chambering of rounds).

[129] *See, e.g., The Perils of Peacekeeping*, U.S. NEWS & WORLD REP., Apr. 25, 1994, at 28 [hereinafter *Perils of Peacekeeping*]. The "rules of engagement" are being reviewed in an incident where two American F-16s shot down two American Black Hawk helicopters. *Id.* at 30. The article quotes an unnamed "angry official" at the Pentagon characterizing the F-16 pilots as "trigger happy Nintendo players" who shot without properly identifying the targets. *Id.* at 29-30. Charges of negligent homicide and dereliction of duty have been brought against one of the fighter pilots involved. *See Air Force Charges Six in Iraqi Shootdown* LEGAL INTELLIGENCER, Sept. 9, 1994, at 4.

[130] *See, e.g.*, United States v. Romero, 1 M.J. 227, 229 (C.M.A. 1975).

[131] *Id.*

[132] United States v. McMonagle, 38 M.J. 53, 59 (C.M.A. 1993).

[133] Prosecution Exhibit 5, *supra* note 28.

[134] *Id.*

[135] *McMonagle*, 38 M.J. at 59.

[136] *See, e.g.*, United States v. Calley, 48 C.M.R. 19, 22 (C.M.A. 1973).

[137] In *McMonagle*, no argument was presented at trial, nor a finding made by the court, that any order given by any of PFC McMonagle's superiors during the incident was illegal. The military judge did not instruct that any orders issued by the accused's superiors were illegal. Private First Class McMonagle was entitled to presume that orders given by his superiors, even those given by SGT Finsel, were legal. *See* DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 509 (July 1956) [hereinafter FM 27-10] (Defense of superior orders discussion); *Calley*, 48 C.M.R. at 11; MCM, *supra* note 69, pt. IV, para. 14c(2)(a)(i) (Inference of lawfulness); *id.* R.C.M. 916(d) (Obedience to orders—superior orders are not a defense if the order was illegal and the soldier actually knew it to be illegal). "Ordinarily the lawfulness of an order is finally decided by the military judge." *Id.* (Discussion, citing R.C.M. 801(e)).

harm upon a person," indicates that Article 118(3) was not intended to apply to situations where a soldier involved in a combat situation shoots at an intended target thinking it to be an enemy.[138] Rather, the two examples of the offense in the *Manual*—throwing a live grenade toward others in jest or flying an aircraft very low over a crowd to make it scatter—are materially different from a soldier shooting at a potential enemy.[139]

Even if one was to overlook the legislative intent and force the application of Article 118(3) to a combat situation, the government is not relieved of its burden of proving intent on the requisite elements. To support a violation of Article 118(3), the government must prove beyond a reasonable doubt that the actor, in this case, PFC McMonagle, possessed the requisite state of mind when he committed the act causing injury.

Murder, as defined by the UCMJ, requires a state of mind showing a heart that is without regard for the life and safety of others.[140] In determining whether the intent necessary to convict an individual alleged to have killed improperly while engaged in an act inherently dangerous to others, subjective reasonableness is the standard by which the conduct must be judged.[141]

Combat situations involving civilian deaths raise two interrelated special defenses of justification and mistake of fact. A mistake of fact can negate unlawfulness because ignorance or mistake of fact produces a mental state that supports a defense of justification.[142] Under Article 118(3), murder is a general intent crime.[143] A mistake of fact must be both honest and reasonable to be a defense to a general intent crime.[144] Therefore, a combatant's mistake as to the identity or status of his target or his entitlement to fire must have been both honest and reasonable to support a defense to murder based on justification.

By raising the affirmative defenses that are based on a subjective evaluation of the accused's conduct, the actions are not objectively limited by reasonableness. Accordingly, matters such as the accused's emotional control, education, and intelligence are relevant in determining the accused's actual belief as to the action necessary to repel the perceived attack.

Relevant jurisprudence examining the issue of justification informs that the pivotal issue of law is whether the accused at the time of the incident acted in the limits of honest judgment on the basis of prevailing conditions.[145] Military necessity in combat operations "permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war."[146] International law further recognizes as an unavoidable consequence of armed conflict the loss of civilian lives.[147] Prohibited only are indiscriminate or excessive attacks in relation to the military advantage to be achieved.[148]

In *McMonagle*, after CPT Sieder's arrival, PFC McMonagle was properly operating under the direction of the company commander and noncommissioned officers.[149] Captain Sieder ordered the accused and other soldiers to provide security to cover the soldiers' withdrawal to the school.[150] Under the

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[138] United States v. McMonagle, 34 M.J. 852, 871 (A.C.M.R. 1992).

[139] *See* MCM, *supra* note 69, pt. IV, ¶ 43c(4)(a). Article 118(3) is intended to cover cases where acts "are calculated to put human lives in jeopardy . . ." United States v. Berg, 30 M.J. 195, 199 (C.M.A. 1990).

[140] *See, e.g.*, United States v. Stokes, 19 C.M.R. 191, 196 (C.M.A. 1955) ("so-what" attitude toward probable results).

[141] United States v. McMonagle, 38 M.J. 53, 60 (C.M.A. 1993).

[142] *Id.* (citing WHARTON'S CRIMINAL LAW § 76 at 369-70 (C. Torcia ed., 14th ed. 1978)).

[143] *Id.* (citing United States v. Craig, 10 C.M.R. 148, 157 (C.M.A. 1953)).

[144] *Id.* (citing United States v. Brown, 22 M.J. 448, 451 (C.M.A. 1986)).

[145] *See, e.g.*, United States v. Wilhelm List, Judgment (Feb. 19, 1948), *in* 10 XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 1233 (1950).

[146] *Id.* at 1232-3.

[147] *See* Geneva Convention Relative to the Treatment of Civilians of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (pt. IV: Civilian Population; ch. II: Civilians and Civilian Population; Art. 51, Protection of the Civilian Population, sect. 4(a)). While discussing the related issue of deaths caused by fratricide, a commentator noted: "If you are operating intensively with live ammunition, with complex systems, there's adrenalin flowing, then this sort of thing is going to happen and you shouldn't expect anything different[.]" *Perils of Peacekeeping*, *supra* note 129, at 28.

[148] *Id.* *See also* FM 27-10, *supra* note 137, at 145 ("The presence of a protected person may not be used to render certain points or areas immune from military operations").

[149] Formal leaders are noncommissioned, warrant, and commissioned officers. The nation has given authority to these soldiers along with special trust and confidence that they will use it to serve the Army and the nation. This authority is derived from law. It gives these leaders power over their soldiers. DEP'T OF ARMY, FIELD MANUAL 22-100, MILITARY LEADERSHIP, 82 (Oct. 1983).

[150] The intervention of PFC McMonagle's chain of command, the passage of time, the physical change of location, and the imposition of the security mission altered the course of events and broke any chain of causation that may have existed, between the initial incident (Phase I) and Mrs. Panay's death (Phase II). *See, e.g.*, United States v. King, 4 M.J. 785, *aff'd*, 7 M.J. 207 (A.C.M.R. 1977).

control of his superiors, PFC McMonagle and the others provided security and maneuvered towards the suspected source of the hostile firing.

Sergeant Finsel ordered PFC McMonagle to fire at a silhouette atop a nearby three-story building.[151] During the engagement, at least eight soldiers in addition to SGT Finsel were involved in keeping security and investigating hostile fire. At least three soldiers with no involvement in SGT Finsel's initial scheme to conceal his loss of a weapon perceived that they were in a fire fight and fired their M-16 rifles in response to what they believed to be hostile fire.[152]

The incidents that led to Mrs. Panay's death took place in a combat zone with armed hostilities ongoing. Visibility was limited and the situation was chaotic and confused. Private First Class McMonagle was frightened.[153] Ample testimony indicates that PFC McMonagle, as well as other soldiers in the area and the company commander, believed that they were under hostile fire on January 25, 1990 and that they reacted accordingly to defend themselves.[154] Under these circumstances, PFC McMonagle necessarily acted as a reasonable soldier under fire in a combat zone.[155]

Conclusion

The military judge's failure to instruct on mistake of fact and justification with respect to Article 118(3) prejudiced PFC McMonagle's defense.[156] The instructions, as stated by the military judge, established a mandatory presumption of intent necessary to convict under Article 118(3).

The COMA's opinion in *McMonagle* corrected two significant errors in the ACMR's majority opinion. First, an accused cannot be convicted of murder pursuant to Article 118(3) unless he or she is subjectively aware of the risks created.[157] Further, in combat situations where interrelated defenses of mistake and justification are raised, an accused's mistaken belief can negate an element of unlawfulness.[158]

Combatants should not be required to hesitate or second-guess actions that they take in combat situations. Existing rules and laws, properly supplemented with leadership, and rules of engagement, provide the needed flexibility and make combatants responsible for their actions. Combatants are trained on the standards and codes of conduct and routinely make such decisions.[159] A model instruction incorporating the laws of war should be drafted.[160] The special facts of accusations of murder in combat situations have historically raised complexities not found in routine prosecutions.[161] To maintain the effectiveness of fighting forces, pattern instructions or commentary to existing rules and instructions should be developed to adequately address these concerns and provide guideposts for judicial officers who deal with these complex situations.[162] Mr. James A. Georges, Attorney-at-Law.

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[151] Record, *supra* note 9, at 251-56.

[152] *See, e.g., id.* at 257. Two prosecution witnesses, SGT Miller and CPL Jones, testified that at the time of the incident, they believed that they were receiving enemy fire from the roof of a building. United States v. McMonagle, 38 M.J. 53, 56 (C.M.A. 1993).

[153] *See* Prosecution Exhibit 5, *supra* note 28. "The alley was dark, I was scared . . . ." *Id.* The intent required to kill or inflict great bodily harm sufficient to convict under Article 118(3) is not present where death is inflicted in the heat of passion caused by adequate provocation. UCMJ art. 118c(3)(a) (1988). "Heat of passion may result from fear . . . ." *Id.* at 119c(1)(a). "[A] fatal blow may be struck before self-control has returned. Although adequate provocation does not excuse the homicide, it does preclude conviction of murder." *Id.*

[154] Record, *supra* note 9, at 268. Corporal Jones testified that "[a]t that time . . . I thought that [shots were] coming off the roof" and responded by shooting "three rounds up towards the roof of the house." *Id.* Corporal Jones also fired on a second occasion, in response to an order from CPT Sieder to "shoot out a light." *Id.* at 280.

[155] Subjective reasonableness is the standard by which a combatant's actions must be evaluated. *McMonagle*, 38 M.J. at 60. Recently, the Israel Defense Forces asserted that many of its actions on the West Bank and Gaza—detention without trial, deportations, demolition of houses, lengthy curfews, censorship, and seizure of land—were permitted under international treaties. *See* Michael Parks, *Israeli Forces Defend Actions*, PHILA. INQUIRER, July 8, 1993, at 3. An Israeli Defense Force spokesman stated "that 'the doctrine of military necessity' was the basis of virtually all Israeli actions and that the limits on the army's use of force were just those of 'reasonableness' and 'proportionality.'" *Id.*

[156] *McMonagle*, 38 M.J. at 61. "The military judge's omission deprived appellant of the opportunity to have his defense [of justification based on mistake of fact] considered by the members." *Id.* (citing United States v. Van Syoc, 36 M.J. 461, 465 (C.M.A. 1993)).

[157] *Id.* at 60 (accused cannot be convicted of "depraved-heart murder 'unless he was subjectively aware of the risk he created.'" (citing W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW, § 7.4 at 204-05 (1986)).

[158] *Id.* (holding incorrect court of review's opinion that accused's mistaken belief would not negate unlawfulness) (citing WHARTON'S CRIMINAL LAW § 76 at 369-70 (C. Torcia ed., 14th ed. 1978).

[159] *See, e.g., The Law of War* (Student Materials), SCHOOL OF INTERNATIONAL STUDIES UNITED STATES ARMY INSTITUTE FOR MILITARY ASSISTANCE at I-30 (undated). "The rules of engagement will guide your actions. These rules set out those targets which you may attack. By knowing the rules, you will be able to act properly in different situations." *Id.*

[160] Judge Johnston may have identified this shortfall when he noted in his opinion that counsel at trial may not have fully understood and that the trial judge only "mentioned" the concept of justification. United States v. McMonagle, 34 M.J. 852, 870 (A.C.M.R. 1992) (Johnston, J., dissenting). Given the errors committed at trial and on initial review, this is a complex subject requiring further study and clarification.

[161] *See, e.g.*, Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974) (historical examples of war causing injury and death to noncombatants and finding that "war is war and it is not at all unusual for innocent civilians to be numbered among its victims"). *Id.* at 711-12.

[162] *See, e.g.*, Paul Alexander, *Marine in Somalia Guilty of Assault*, PHILA. INQUIRER, Apr. 7, 1993, at A3 (issue of whether Marine Gunnery Sergeant struck in the head by youth, fired at youth "on the spur of the moment fearing for his safety, or whether the shot came as [the youth] was fleeing and was fired in revenge").

One Step Forward, Two Steps Back: The Law of Lesser-Included Offenses After *United States v. Foster*[163]

Introduction

The law of lesser-included offenses in military jurisprudence has changed very little since Colonel Winthrop first wrote in 1886:

> Conviction of a lesser kindred offence . . . is properly resorted to where the offence charged is one which includes, as a *necessary constituent*, another offence of lesser gravity, and where the evidence—the accused having pleaded Not Guilty—falls short of fixing upon the accused the superior but shows him to have committed the inferior offence.[164]

The persistent question in this area of the law has been what makes an offense, in Colonel Winthrop's words, "a necessary constituent" of another. In *United States v. Foster*,[165] the COMA addressed this question. Unfortunately, the COMA both clarifies and complicates the law of lesser-included offenses under the UCMJ. *Foster* is likely to significantly effect the practice of military justice, and deserves the attention of all military practitioners. This practice note critically examines the statutory context of the law of lesser-included offenses, the holding and rationale of *Foster*, and the possible consequences of this decision for the attorney in the field.

Background

Article 79, UCMJ, provides in part that "[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."[166] In *United States v. Baker*,[167] the COMA held that an offense is "necessarily included" in another[168] in two circumstances:

> First, where one offense contains only elements of, but not all the elements of the other offense; second, where one offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense and established by evidence introduced at trial.[169]

These two tests remained a part of military jurisprudence until the COMA reconsidered their continued vitality in *United States v. Teters*.[170] In *Teters*, the COMA abandoned[171] the latter, or "fairly embraced," test for determining whether two offenses stand in the relationship of greater and lesser offenses.[172] The *Teters* decision left two significant questions unanswered, however: the status of the "elements" test announced in *Baker* for determining the relationship between two offenses, and whether an offense under the general article[173] could ever be a lesser-included offense to an offense enumerated in Articles 78 and 80 to 132.[174] The COMA addressed both of these issues in *Foster*.

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[163] 40 M.J. 140 (C.M.A. 1994).

[164] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 382 (2d ed. 1920) (emphasis added).

[165] *Foster*, 40 M.J. at 140.

[166] UCMJ art. 79 (1988). The quoted provision is virtually identical to Federal Rule of Criminal Procedure 31(c). *See* FED. R. CRIM. P. 31(c).

[167] 14 M.J. 361 (C.M.A. 1983). *Baker* has been abrogated by the combined effects of the COMA's decisions in *Foster* and United States v. Teters, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994).

[168] Assuming, that is, that both offenses arise out of the same transaction.

[169] *Baker*, 14 M.J. at 368. The former test came to be known as the "traditional" or "elements" test, while the latter became known as the "fairly embraced" test.

[170] *Teters*, 37 M.J. at 370.

[171] One could argue, however, that this abandonment was merely dicta because *Teters*'s ultimate holding involved multiplicity, a related, but nonetheless different, topic than the law of lesser-included offenses.

[172] *Teters*, 37 M.J. at 376. In reaching its conclusion to discard the "fairly embraced" test announced in *Baker*, the COMA relied on the U.S. Supreme Court's decision in Schmuck v. United States, 489 U.S. 705 (1989). The Court in *Schmuck* held that "necessarily included," as used in FEDERAL RULE OF CRIMINAL PROCEDURE, *supra* note 5, 31(c), meant that "the elements of the lesser offense are a subset of the elements of the charged offense." *Id.* at 716.

[173] UCMJ art. 134 (1988).

[174] The problem of lesser-included offenses arising under Article 134, UCMJ, is that offenses arising under the general article have an element requiring proof of a fact that is not required for offenses arising under Articles 78 to 133 (*i.e.*, that such conduct was service discrediting or prejudicial to good order and discipline). This seemingly unique element would thereby prevent an offense under the general article from ever being "necessarily included" in an offense arising under another article of the UCMJ. *See* Lieutenant Colonel Gary J. Holland & Major Willis Hunter, *United States v. Teters: More Than Meets the Eye?*, ARMY LAW., Jan. 1994, at 16, 20-21.

United States v. Foster: *Statement of the Case*[175]

Technical Sergeant (TSgt) Foster was charged, *inter alia*, with forcible sodomy on Airman (AMN) KLT.[176] At trial, the members instead found the accused guilty, by exceptions and substitutions, of indecently assaulting AMN KLT in violation of Article 134, UCMJ.[177] On appeal, the AFCMR found that the specification alleging forcible sodomy failed to place the accused "on notice of the essential element of the lesser offense of indecent assault that the victim is not the spouse of the appellant."[178] The AFCMR found, however, that the specification in question apprised the accused of the lesser offense of indecent acts with another, and affirmed TSgt Foster's conviction for that lesser offense.[179]

The COMA granted review of the issue[180] as to whether the AFCMR erred by treating indecent acts as a lesser-included offense of forcible sodomy.[181] The COMA found no error and affirmed TSgt Foster's conviction.[182] In reaching its conclusion, the COMA confirmed[183] that an offense is necessarily included in another only if the statutory "elements of the lesser offense are a subset of the elements of the charged offense."[184] An elemental "subset" may be either quantitative or qualitative in nature.[185] If the lesser offense has some, but not all, of the statutory elements of the charged offense, and does not have any elements not included in the charged offense, then the lesser offense is a "quantitative subset" of the charged offense and is necessarily included therein.[186] Alternatively, if each element of the lesser offense "is *rationally* derivative of one or more of the elements of the other offense," then the elements of the lesser offense are a "qualitative subset" of the elements of the charged offense.[187]

The COMA also addressed the second issue left unresolved in *Teters* when, in *Foster*, it held "that an offense arising under the general article may, depending upon the facts of the case, stand either as a greater or lesser offense of an offense arising under an enumerated article."[188] The COMA reasoned that all offenses enumerated in Articles 78 and 80 to 132 are inherently either prejudicial to good order and discipline or service discrediting, and they share this implicit element with offenses prescribed by the general article;[189] in the absence of an inherently unique element, offenses arising under the general article are no longer isolated from the enumerated offenses for purposes of the law of lesser offenses. The government need not prove this tacit element in a prosecution of an enu-

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[175] The facts are relatively unimportant to the ultimate holding of the case. The COMA described the events giving rise to the case in the following manner. On the evening of 25 June 1990, Airman (AMN) KLT was asleep on a futon in the dormitory room of Airman Basic (AB) Larson. Airman KLT awoke to find the underpants and shorts that she had been wearing when she lay down had been removed, and her shirt had been pushed up around her neck. She observed that Technical Sergeant (TSgt) Foster was kissing her breasts. When AMN KLT told TSgt Foster to stop, he complied and departed the room. Airman KLT fell back asleep, only to be awakened a second time to find TSgt Foster had returned. Technical Sergeant Foster had his hands on AMN KLT's breasts and his head between her legs; AMN KLT believed that TSgt Foster was performing oral sex on her. Airman KLT again told TSgt Foster to stop, and subsequently climbed into bed with AB Larson, who apparently remained asleep during these encounters. Airman KLT fell asleep, but was awakened a final time by TSgt Foster reaching under the bed sheets to fondle her body. United States v. Foster, 40 M.J. 140, 144-5 (C.M.A. 1994).

[176] *Id.* at 142.

[177] *Id.* In its opinion, the Air Force Court of Military Review (AFCMR) indicated that the members "were not convinced beyond a reasonable doubt that appellant had 'physically penetrated the sexual organs of Amn KLT with his mouth.'" United States v. Foster, 34 M.J. 1264, 1265 (A.F.C.M.R. 1992), *aff'd*, 40 M.J. 140 (C.M.A. 1994). The COMA quotes language, apparently from the record of trial, that indicates the basis for the indecent assault conviction was the accused's actions in "taking off [AMN KLT's] shorts and underwear, pushing up her T-shirt and touching her breasts, and kissing around her genital area with intent to gratify his sexual desires." *Foster*, 40 M.J. at 142.

[178] *Foster*, 34 M.J. at 1267.

[179] *Id.* The President, under the provisions of Article 36(a), UCMJ, has previously described indecent assault as a lesser-included offense to forcible sodomy, *see* MCM, supra note 69, pt. IV, ¶ 51.d.(2)(c) and indecent acts with another as a lesser-included offense to sodomy. *Id.* ¶ 51.d.(3)(a).

[180] The COMA also granted review of the issue concerning the military judge's failure to grant the defense motion to sever the charges in this case. *Foster*, 40 M.J. at 142 n.2. The severance issue is beyond the scope of this practice note, and will not be discussed here.

[181] *Id.* at 146.

[182] *Id.* at 147.

[183] Judge Cox, in the opinion of the court, announced that "[w]e now adopt the [elements] test for determining whether an offense is a lesser-included offense." *Id.* at 142. In *Teters*, the COMA abandoned the "fairly embraced" test for determining lesser-included offenses, but failed to resolve the status of the elements test. United States v. Teters, 37 M.J. 370, 376 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994). While one could have reasonably concluded that the COMA implicitly had adopted the elements test in *Teters*, Judge Cox's clarifying pronouncement is nonetheless welcome.

[184] *Foster*, 40 M.J. at 142 (quoting Schmuck v. United States, 489 U.S. 705, 716 (1989)).

[185] *Id.* at 146.

[186] *See id. But cf.* MCM, *supra* note 69, pt. IV, ¶ 3.b.(1) (providing that lesser-included offense *may* include element not included in charged offense).

[187] *Foster*, 40 M.J. at 146.

[188] *Id.* at 143.

[189] *Id.*

merated offense, but would have to do so when either the charged offense or a lesser-included offense is a violation of the general article.[190]

Discussion and Analysis

Foster is a significant decision in a number of respects. *Foster* markedly simplifies the law of lesser-included offenses in military jurisprudence. Practitioners now need only consult the statutory elements of two offenses to determine whether they stand as greater and lesser-included offenses to one another; if the elements of the lesser offense are a subset of the charged offense, then an accused may not properly be convicted of both offenses.[191] Furthermore, the use of statutory elements to identify lesser-included offenses introduces a certain intellectual "economy of scale" for trial practitioners, because a similar methodology is already used to determine whether offenses are separate for multiplicity purposes.[192] Finally, an objective elements test will be easier to apply in a consistent manner than the so-called "pleadings and proof" standard announced in *United States v. Baker*.[193]

While *Foster* clarifies the law of lesser-included offenses, it creates a number of potential problems of judicial economy and due process by its analysis; the decision may actually generate more confusion than it resolves. For example, the significantly ambiguous concept of a "qualitative subset" of elements may adversely affect judicial economy at both trial and appellate levels. The COMA apparently[194] derives this construct from the *Manual*'s discussion of lesser-included offenses. The *Manual* provides, in relevant part, that an offense is a lesser-included offense of a charged offense when all the elements of the lesser offense are included in the greater offense, and either the common elements are identical, or one or more of the elements, including the mental element, are legally less serious.[195] The COMA expands this relatively straightforward model and concludes that an offense is necessarily included in another whenever "each element of the supposed 'lesser' offense is *rationally* derivative of one or more of the elements of the other offense."[196] The use of such an ambiguous standard substantially negates the clarity provided by the "quantitative subset" test, and will likely result in much

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[190] *Id.*

[191] *See id.* at 143-44. This analysis assumes that the two offenses arise in a single criminal transaction.

[192] *See* United States v. Teters, 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994). This comprehensive methodology could now be described as follows:

I. Is there a single criminal transaction?

A. If not, offenses arising in separate transactions generally may be separately charged and punished.

B. If there is a single criminal transaction, then offenses arising therefrom may be separately charged and punished only if they are separate offenses.

II. Are the offenses in the single criminal transaction "separate?"

A. Offenses are separate if the legislature intended to impose cumulative punishments.

B. The legislative intent to impose cumulative punishments must be "clearly expressed" in the statute, legislative history, or other recognized guidelines for discerning legislative intent.

C. If such intent is not "clearly expressed," then it may be implied if the statutory elements of the multiple offenses reveal that each offense requires proof of a fact that the other does not.

III. If the offenses are not separate, you must then determine if they are greater and lesser-included offenses of one another, or are merely multiplicious.

A. Look again at the statutory elements of the offenses; if the elements of one are either a quantitative or qualitative subset of the other, then they stand in the relation of greater and lesser-included offenses. Both offenses should not be charged unless the lesser offense arises under Article 134, UCMJ.

B. If the offenses are not included in one another, then they are simply multiplicious. Multiplicious offenses may not be separately charged unless required by the exigencies of proof. Even if separately charged, an accused may only be properly convicted of, and sentenced for, one offense from those deemed multiplicious for findings.

IV. The military judge should give appropriate instructions to panel members to ensure that an accused is not convicted of offenses that are greater and lesser-included offenses or multiplicious for findings.

V. Multiplicity for sentencing is unaffected by the court's decision in *Foster*, and awaits the court's scrutiny and repair in some later opinion.

[193] 14 M.J. 361 (C.M.A. 1983); *see* Schmuck v. United States, 489 U.S. 705 (1989).

[194] The COMA cites no authority in support of its "rationally derived" analysis. *See Foster*, 40 M.J. at 146.

[195] MCM, *supra* note 69, pt. IV, ¶ 3.b.(1).

[196] *Foster*, 40 M.J. at 146.

time and effort spent litigating just which offenses are "rationally derived," "qualitative subsets" of charged offenses.[197]

Foster also implicates due process concerns with its guidance that prosecutors plead lesser-included offenses arising under Article 134, UCMJ, separately from, and in addition to, the greater offense.[198] Such "prolix pleading"[199] is unnecessary and may unduly prejudice the accused. It is unnecessary because the COMA's decision in *Foster* already places an accused on notice that he or she may be convicted of an uncharged Article 134 offense whose elements are either a quantitative or qualitative subset of the elements of the charged offense.[200] It can be unduly prejudicial to an accused because the proliferation of charged offenses arising from a single criminal transaction may "create the impression that the accused is a bad character and therefore lead the court-martial to resolve against him doubt created by the evidence,"[201] thereby infringing on an accused's right to a fair trial and to prepare a defense.[202] As such, *Foster* continues the erosion of an accused's protection against unreasonable multiplication of charges begun in *Teters*, and does so in a manner that is likely to cause much litigation concerning its meaning and application.

Practice Tips for Counsel

Foster contains a number of potential pitfalls for the unwary practitioner. Counsel should be aware that the descriptions of lesser-included offenses contained in the *Manual*'s discussion of individual offenses are not necessarily exhaustive or even accurate after *Foster*. Trial counsel must remember to plead lesser-included offenses arising under the general article separately from the greater, charged offense, and to prove beyond a reasonable doubt that the conduct in question was either service discrediting or prejudicial to good order and discipline.[203] Conversely, defense counsel must ensure that they request the military judge to instruct the panel members as to why the Article 134 offense is included on the charge sheet and that the accused could not be convicted of both the greater and lesser-included offenses.[204] Military judges and defense counsel must heed Judge Cox's admonition to "exercise sound judgment to ensure that imaginative prosecutors do not needlessly 'pile on' charges against a military accused."[205] Similarly, all participants in the court-martial process should be mindful that "[a] fair result remains not only the objective, but indeed the justification of the military justice system."[206]

Conclusion

United States v. Foster significantly revises the law of lesser-included offenses under the UCMJ. The COMA has expressly adopted an "elements only" test for identifying lesser-included offenses, and held that offenses arising under the general article may "stand either as a greater or lesser offense of an offense arising under an enumerated article."[207] While the decision somewhat clarifies the law in this area, the COMA's holding and rationale implicate significant concerns of judicial economy and due process.[208] Practitioners should be alert to the need for further litigation to define the limits of the "rationally derived" standard for describing qualitative

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[197] The Supreme Court case on which the COMA relies for authority to adopt an "elements" test for determining lesser-included offenses makes no mention of "qualitative subsets" of elements. *See* Schmuck v. United States, 489 U.S. 705 (1989). In that case, the Supreme Court seemed to require *identical* elements within subsets rather than rational derivation. *See id.* at 721-22. The Court reasoned that the "elements" test was "certain and predictable in its application . . . [and] promotes judicial economy by providing a clearer rule of decision." *Id.* at 720-21. The same cannot be said for the "rationally derived" system of "qualitative subsets" of elements announced in *Foster*. As Senior Judge Snyder of the AFCMR recently wrote, "I harbor misgivings as to where 'rationally derived' might take us? Will it be to a new runway with lights to be installed later, or will it be to the *Baker* runway reactivated?". United States v. Weymouth, 40 M.J. 798, 805 (A.F.C.M.R. 1994) (concurring).

[198] *Foster*, 40 M.J. at 143.

[199] 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D, § 142, at 475 (1982).

[200] *Cf.* MCM, *supra* note 69, ¶ 3.b.(1) (explaining Article 79, UCMJ, as a function of notice to accused).

[201] United States v. Baker, 14 M.J. 361, 365 (C.M.A. 1983).

[202] *Id.* at 364 n.1. Judge Cox, writing for the court, expresses concern that if offenses arising under the general article are not able to be considered as lesser-included offenses, then "servicemembers would be denied the opportunity for instructions on lesser-included offenses in appropriate cases." *Foster*, 40 M.J. at 143. This concern is somewhat misplaced in that the practice of allowing an accused to be convicted of uncharged, lesser-included offenses "developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." Schmuck v. United States, 489 U.S. 705, 717 n.9 (1989) (quoting Beck v. Alabama, 447 U.S. 625, 633 (1980)). It is undeniable that the availability of lesser-included offense instructions *can* benefit the defense in certain circumstances; absent empirical evidence to the contrary, however, Article 79 is equally likely, from a statistical standpoint, to benefit the prosecution in any given case. *Cf.* 3 WRIGHT, *supra* note 199, § 515, at 20 n.3 ("[T]he lesser offense rule has both advantages and dangers to each side in a criminal case.") (citations omitted).

[203] *Foster*, 40 M.J. at 143. Conversely, trial counsel need not separately plead lesser-included offenses arising under enumerated articles, nor prove beyond a reasonable doubt that such conduct is service discrediting or prejudicial to good order and discipline. *Id.*

[204] *See id.*

[205] *Id.* at 144 n.4.

[206] *Id.*

[207] *Id.* at 143.

[208] *See supra* notes 194-202 and accompanying text.

subsets of elements, and continue to guard against unreasonable multiplication of charges against an accused. In any event, *Foster* is not likely to be the last word in the law of lesser-included offenses.[209] Major Barto.

Subordinate's Knowledge Does Not Turn Inspection into Subterfuge for Criminal Search

In *United States v. Taylor*,[210] the COMA clarified the rules that apply to military inspections. In *Taylor*, the COMA upheld a urinalysis inspection even though a subordinate of the commander who ordered the inspection suspected the accused of drug use and volunteered the accused's section for the inspection. The COMA found that, because the subordinate did not communicate his suspicions to the commander, the inspection was not a subterfuge for an illegal criminal search.

In *Taylor*, the accused, Staff Sergeant (SSG) Keith Taylor, was a member of the S-1 section of the 5th Marine Regiment at Camp Pendelton, California. On December 8, 1989, SGT Ramon, the Substance Abuse Control Officer of the accused's regiment, received an anonymous telephone message that someone in the S-1 section was using drugs. Subsequently, a former member of the S-1 section told SGT Ramon that the accused was a drug user.

On December 9, 1989, the accused's company commander, Captain (Capt.) Lindsay, decided to order a random urinalysis the following week. Captain Lindsay was unaware of the anonymous tip and report concerning the accused's drug use. Captain Lindsay had only a limited number of vials and had not yet decided how to select the section to be tested.

On December 11, 1989, Sergeant Ramon told the officer in charge of the S-1 section, Capt. Jackson, about the anonymous call and report. Captain Jackson called Capt. Lindsay and asked if he planned on conducting a urinalysis test. When Capt. Lindsay stated that he was going to conduct a random test that week, Capt. Jackson volunteered the S-1 section. Captain Lindsay responded "Fine, that fits right along, and why not just go ahead and get it out of the way."[211] No one had ever volunteered a section for a urinalysis inspection before.

As a result of this conversation, the accused and the rest of the S-1 section underwent a urinalysis inspection the next day. The accused's urine tested positive for marijuana metabolites and the accused was subsequently convicted of drug use.

Under Military Rule of Evidence (MRE) 313,[212] evidence obtained from an inspection is admissible, despite the absence of a search authorization or warrant based on probable cause. Under MRE 313(b),[213] the primary purpose of an inspection must be administrative. The primary purpose must be to determine security, military fitness, or good order and discipline of a unit, organization, installation, vessel, aircraft, or vehicle. However, if the primary purpose is to obtain evidence of a crime for use at a court-martial, the examination is considered a criminal search rather than a proper inspection under MRE 313.[214]

Under MRE 313(b), certain examinations are presumed to be subterfuges for criminal searches rather than proper inspections. Under this "subterfuge" rule, the government must prove, by clear and convincing evidence, that the primary purpose of an inspection was administrative if one of its purposes was to locate weapons or contraband, and (1) it was directed immediately following the report of a specific offense and not previously scheduled, or (2) specific individuals were targeted, or (3) persons were subjected to substantially different intrusions.[215]

Judge Crawford, writing the majority opinion in *Taylor*, determined that the urinalysis inspection of the accused's section was not a subterfuge for a criminal search. Judge Crawford stated that the court's principal focus was on the commander, Capt. Lindsay. Although the anonymous tip and report concerning the accused's drug use may have been a "report of a specific offense," Judge Crawford held that this did not trigger the subterfuge rule because this information was not passed on to the commander, Capt. Lindsay.[216]

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[209] After *Foster*, for example, whether an offense arising under the general article could ever be a lesser-included offense to conduct unbecoming an officer in violation of Article 133, UCMJ, is unclear. Strict application of the "elements" test would seem to indicate that such a relationship is not possible because each offense has an element that the other does not, whereas application of the "rationally derived" test might lead to an opposite conclusion. As certain commentators have noted, "[u]ncertainty abounds in the law." Holland & Hunter, *supra* note 174, at 20.

[210] No. 93-0595 (C.M.A. 30 Sept. 1994).

[211] *Id.* at slip op. 5.

[212] MCM, *supra* note 69, MIL. R. EVID. 313.

[213] *Id.* MIL. R. EVID. 313(b).

[214] *Id.*

[215] *Id.*

[216] United States v. Taylor, No. 93-0595, slip op. at 11 (C.M.A. 30 Sept. 1994). Judge Crawford also noted, in dicta, that the Supreme Court never has expressly applied the bill of rights to the military. She pointed out that the Fourth Amendment may not apply to the military at all. *Id.* slip op. at 8. For an excellent discussion of this issue, *see* FREDRIC I. LEDERER & FREDERIC L. BORCH, DOES THE FOURTH AMENDMENT APPLY TO THE ARMED FORCES?, 3 WM. & MARY BILL OF RIGHTS J. 219 (Summer 1994).

Judges Cox and Gierke concurred with Judge Crawford's opinion.[217]

Chief Judge Sullivan and Judge Wiss dissented. Chief Judge Sullivan argued that no legal or factual basis for the majority's decision existed.[218] Judge Wiss argued that the evidence in the record indicated that Capt. Lindsay was tainted by the anonymous tip and report of drug use. Judge Wiss pointed out that Capt. Lindsay asked SGT Ramon if there was "anything special going on" in the S-1 section, and that SGT Ramon responded, "I don't think I'm at liberty of discussing this with you at this particular time, sir."[219] Judge Wiss viewed Capt. Lindsay's failure to investigate further as a "wink and a nod."

Judge Wiss also disagreed with the majority's effort to build a "Chinese wall" around the commander, insulating him from information held by his subordinates. Judge Wiss pointed out that the purpose of MRE 313 is undermined when a subordinate, who has knowledge of a report of a specific offense, withholds that knowledge from the commander and then affirmatively influences the commander's decision whether to inspect and who to inspect.[220]

Taylor reduces the protection that the Fourth Amendment and MRE provide military accused in the area of inspections. Under *Taylor*, the subterfuge rule of MRE 313(b) generally will not be triggered by the report of a specific offense unless the commander is aware of the report.[221] This makes it harder to trigger the rule and more difficult for an accused to challenge an inspection.

Taylor was designed to prevent soldiers from challenging proper inspections simply because some of the commander's subordinates have knowledge of criminal activity. However, *Taylor's* focus on the commander may allow subordinates to manipulate inspections by volunteering a section of the unit containing soldiers that they suspect of an offense.[222] In such cases, the government probably can avoid triggering the subterfuge rule as long as subordinates do not pass on their knowledge to the commander.

Practitioners should not read *Taylor* too broadly. It will not allow the government to avoid the subterfuge rule when subordinates actually select individuals for inspections. In *United States v. Campbell*,[223] a case decided by the COMA on the same day as *Taylor*, the COMA held that the subterfuge rule was triggered when a unit first sergeant selected individuals to be tested. The first sergeant heard rumors of drug use in his unit, prepared a list of suspects to be tested, including the accused, and passed the list on to the unit commander, who ordered a urinalysis inspection of the individuals on the list. Chief Judge Sullivan, writing the majority opinion in *Campbell*, held that the inspection was an improper subterfuge for a criminal search.[224]

Taylor also will not allow the government to avoid the subterfuge rule when subordinates pass their knowledge of criminal activity on to the commander. In his concurring opinion in *Campbell*, Judge Gierke observed that the inspection in that case was an improper subterfuge for a criminal search because the first sergeant passed his information on to the commander.[225] Judge Gierke stated that *Taylor* was distin-

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[217] Judges Cox and Gierke also concurred with Judge Crawford's opinion in United States v. Lopez, 35 M.J. 35 (C.M.A. 1992), where she first indicated that the Supreme Court has never expressly applied the Bill of Rights to the military. Judge Cox has a unique view of the Fourth Amendment's applicability to the military. Although he believes that the Fourth Amendment applies to the military, he believes that it "only protects military members against *unreasonable* searches within the context of military society." *Id.* at 45 (Cox, J., concurring with modest reservations) (emphasis added).

[218] Chief Judge Sullivan also rejected Judge Crawford's dicta concerning the possible inapplicability of the Fourth Amendment to the military by pointing out that in Weiss v. United States, 114 S. Ct. 752 (1994) and Middendorf v. Henry, 425 U.S. 25 (1976), the Supreme Court applied constitutional protections to military accused. Chief Judge Sullivan also noted that in Davis v. United States, 114 S. Ct. 2350, 2354 (1994), the Supreme Court assumed that the Fifth Amendment right to counsel applied to military accused. United States v. Taylor, No. 93-0595, slip op. 18-19 (C.M.A. 30 Sept. 1994).

[219] *Taylor*, slip op. at 22.

[220] *Id.* slip op. at 23. Judge Wiss also disagreed with Judge Crawford's dicta on the possible inapplicability of the Fourth Amendment to the military. He argued that it disregarded historical precedent and was of only academic interest. *Id.* slip op. at 24.

[221] This is arguably inconsistent with the language of the subterfuge rule. The rule states that it is triggered by the "report of a specific offense in the unit," not the report of an offense to the commander. MCM, *supra* note 69, MIL. R. EVID. 313(b). The other two triggers of the subterfuge rule (targeting or selecting specific individuals for examination and subjecting individuals to substantially different intrusions) can be activated by actions of the commander's subordinates. *Id.*

[222] Arguably, the rational of *Taylor* could be extended to allow the government to avoid the subterfuge rule even though subordinates volunteer specific individuals for inspection. However, such an inspection probably would not be valid, because it would involve the targeting or selection of specific individuals for examination, a trigger of the subterfuge rule not discussed in *Taylor*. *Taylor*, slip op. at 11; MCM, *supra* note 69, MIL. R. EVID. 313(b).

[223] No. 93-0277 (C.M.A. 30 Sept. 1994).

[224] *Id.* Judge Wiss concurred in the majority opinion, and Judges Gierke and Crawford wrote concurring opinions. Both Judges Gierke and Crawford disagreed with Chief Judge Sullivan's quotation from United States v. Bickel, 30 M.J. 277, 286 (C.M.A. 1990), which indicated that personnel to be tested must be selected on the basis of an established policy or guideline for a urinalysis inspection to be valid. Judge Cox dissented.

[225] *Campbell*, slip op. at 28. Judge Gierke noted that the first sergeant informed the commander of everything he had done in compiling the list and that the commander was aware of, and participated in, the first sergeant's activities. *Id.*

guishable because the subordinates had not provided any information to the commander.[226]

Additionally, *Taylor* probably does not allow the government to avoid the subterfuge rule when commanders are intentionally ignorant of reports of crime. In her majority opinion in *Taylor*, Judge Crawford pointed out that there was no indication of a "wink and a nod" between Capt. Lindsay, Capt. Jackson, and SGT Ramon.[227] Affirmative efforts by a commander to get subordinates to volunteer soldiers for inspection but not pass on reports of crime on which the volunteers' selections are based, would probably be viewed as a "wink and a nod" and condemned by COMA.[228] Major Masterton.

Dangerous Weapons, Unloaded Firearms, and the Law of Aggravated Assault: The ACMR Hangfires in Two Conflicting Opinions

"Like a man to double business bound, I stand in pause where I shall first begin, And both neglect."[229]

In *United States v. Sullivan*,[230] the ACMR held that a firearm can be a "dangerous weapon" within the meaning of the UCMJ's aggravated assault provisions[231] even if the firearm is nonfunctional or unloaded.[232] *Sullivan* is a radical departure, however, from military precedent and the *Manual*, both of which had reasoned that an unloaded firearm, when used as such and not as a bludgeon, was not a "dangerous weapon or a means or force likely to produce grievous bodily harm."[233] In *United States v. Rivera*,[234] a separate ACMR panel subsequently chose to abide by this long-standing rule of law and refused to follow the *Sullivan* decision. This note will examine the law of aggravated assault in light of *Sullivan* and *Rivera*, and consider the effects that the conflict between the two decisions has on the military justice practitioner.

The Law of Aggravated Assault

Article 128, UCMJ, provides, in part, that "[a]ny person subject to this chapter who . . . commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm . . . is guilty of aggravated assault."[235] While Article 128 does not define "dangerous weapon,"[236] the *Manual* states that "an unloaded pistol, when presented as a firearm and not a bludgeon, is not a dangerous weapon or a means or force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded."[237] This focus on the objective capability of the weapon used in the assault reflects the traditional position that "the gravamen of aggravated assault is less preoccupied, than that of simple assault, with the victim's reasonable apprehension of injury—as distinguished from the assailant's actual ability to inflict harm."[238] The COMA has described this standard as one of "unqualified objectivity, for it entirely omits the possible presence of reasonable apprehension."[239] Consequently, the historically relevant perspective in the military for determining whether an aggravated assault had been committed was not that of the victim, but rather that of the perpetrator.[240] This objective approach to defining aggravated assault is, however,

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226 *Id.*

227 In her majority opinion, Judge Crawford pointed out that there was no indication of a "wink and a nod" between Capt. Lindsay, Capt. Jackson, and SGT Ramon. United States v. Taylor, No. 930-0595, slip op. at 11-12 (C.M.A. 30 Sept. 1994).

228 Judge Crawford's suggestion that the Fourth Amendment may not apply to the military may signal an even more radical reduction in soldier' protections in the area of searches and seizures. If the MREs provide the only protections in this area, the President could rewrite these rules to provide commanders with vastly increased powers to search and seize. *See* BORCH & LEDERER, *supra* note 216, at 225.

229 WILLIAM SHAKESPEARE, HAMLET act 3, sc. 3.

230 36 M.J. 574 (A.C.M.R. 1992).

231 UCMJ art. 128 (1988). Article 128(b)(1) states, in pertinent part, that "[a]ny person subject to this chapter who . . . commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm . . . is guilty of aggravated assault and shall be punished as a court-martial may direct."

232 *Sullivan*, 36 M.J. at 577.

233 *See infra* notes 235-41 and accompanying text.

234 40 M.J. 544 (A.C.M.R. 1994).

235 UCMJ art. 128(b) (1988).

236 The *Manual* specifies that "[a] weapon is dangerous when used in a manner likely to produce death or grievous bodily harm." MCM, *supra* note 69, pt. IV, ¶ 54c(4)(a)(i).

237 *Id.* ¶ 54c(4)(a)(ii). The quoted language is virtually identical to that found in previous editions of the *Manual*. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, United States, ¶ 207c(1) (rev. ed. 1969).

238 United States v. Smith, 4 C.M.A. 41, 46, 15 C.M.R. 41, 46 (1954).

239 *Id.* at 47, 15 C.M.R. at 47.

240 *Id.*

the minority view; a slight preponderance of authority now recognizes that aggravated assault can be committed with an unloaded firearm, even if the weapon is used solely as a firearm and not as a bludgeon.[241] *Sullivan* and *Rivera* reflect the tension between these two positions, and create uncertainty as to which camp military jurisprudence belongs.

The Case of United States v. Sullivan

Private (PV2) Paul Sullivan shared a barracks room at Fort Carson, Colorado, with Private First Class (PFC) Lorenzo. Private Sullivan became angered one day because PFC Lorenzo, along with another soldier, Specialist (SPC) Martinez, were brewing coffee in the room. Private Sullivan expressed his displeasure by retrieving a semi-automatic pistol from his wall locker, loading it, chambering a round, and pointing the pistol at PFC Lorenzo's head from a distance of twelve inches. After PFC Lorenzo dove for cover, PV2 Sullivan then pointed the weapon directly at the face of SPC Martinez from a distance of four feet. Private Sullivan eventually diverted his aim, unloaded and disassembled the pistol, and told PFC Lorenzo that he really did not intend to shoot either soldier.[242] Private First Class Lorenzo nonetheless reported the incident; PV2 Sullivan was apprehended and the pistol was seized from his room.

At trial, PV2 Sullivan was charged, inter alia, with aggravated assault in violation of Article 128, UCMJ.[243] The government introduced evidence concerning the assault, but failed to produce any "direct testimony or other evidence . . . to prove that the pistol used in the assault was fully functional."[244] The accused was convicted and sentenced to "a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to Private E1."[245] On appeal, the ACMR considered "whether the government must prove beyond a reasonable doubt that a loaded pistol is fully functional in order to sustain a conviction for assault with a dangerous weapon."[246] The ACMR held that it did not, concluding instead that an apparently functional pistol brandished in a threatening manner is a "dangerous weapon" whether or not it is actually functional or even loaded.[247] In reaching this holding, the ACMR relied almost exclusively on the United States Supreme Court's decision in *McLaughlin v. United States*.[248]

In *McLaughlin*, the Supreme Court considered whether an unloaded handgun is a "dangerous weapon" within the meaning of the federal bank robbery statute.[249] The Court identified three factors supporting its conclusion that an unloaded gun is in fact a "dangerous weapon."

> First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.[250]

The ACMR expressly adopted the Supreme Court's rationale, and in *Sullivan* concluded that a weapon need not be either loaded or functional to be dangerous; the important perspective was no longer the objective capability of the object used to commit the assault, but rather the subjective perception of the victim as to the capability of the weapon to inflict death or grievous bodily harm.[251]

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[241] *See* Jeffrey F. Ghent, Annotation, *Fact that Gun was Unloaded as Affecting Criminal Responsibility*, 68 A.L.R. 518 (1989). *But cf.* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW ¶ 7.15, at 309 (1986) ("[A]n unloaded gun, not used as a bludgeon, ought *not* to be considered a dangerous or deadly weapon for purposes of aggravated battery.") (footnote omitted) (emphasis added).

[242] United States v. Sullivan, 36 M.J. 575 (A.C.M.R. 1992).

[243] *Id.* Private Sullivan also was charged with violation of a lawful general regulation under Article 92, UCMJ.

[244] *Id.*

[245] *Id.*

[246] *Id.* Interestingly, the issue was apparently not raised at trial and the court did not address the issue of waiver in its opinion.

[247] *Id.* at 577.

[248] 476 U.S. 16 (1986).

[249] *Id.* McLaughlin and a companion robbed a bank in Baltimore with a "dark handgun" that was discovered to be unloaded only after they were apprehended leaving the bank.

[250] *Id.* at 17-18 (*quoted in* United States v. Sullivan, 36 M.J. 574, 577 (A.C.M.R. 1992)). The Court implicitly read 18 U.S.C. § 2113(d) as proscribing the use of a "dangerous weapon" to either (1) assault, or (2) jeopardize the life of another. One could thereby reason that because an assault with a loaded firearm necessarily jeopardizes the life of the victim, then the term "dangerous weapon" as used in § 2113(d) either includes unloaded firearms, or is superfluous. *See generally* Russell J. Davis, Annotation, *What Constitutes "Puts in Jeopardy" Within Enhanced Penalty Provision of Federal Bank Robbery Act* (18 U.S.C. § 2113(d)), 32 A.L.R. FED. 279 (1977). In contrast, Article 128(b)(1), UCMJ, equates "dangerous weapon" with "a means or force *likely* to produce death or grievous bodily harm." (emphasis added). *See infra* note 258 for an expanded comparison of the two statutes.

[251] *Sullivan*, 36 M.J. at 577.

A Response to Sullivan: United States v. Rivera

Specialist Edwin Rivera was convicted, pursuant to his pleas, of escape from custody, assault consummated by a battery, and aggravated assault.[252] During the providence inquiry and in a stipulation of fact, Rivera admitted that "he pointed an unloaded pistol at two other soldiers, causing them to scramble in the belief that their lives were in danger."[253] The military judge informed the accused that an unloaded pistol was a "dangerous weapon" within the meaning of Article 128, UCMJ, when used as a firearm and not as a bludgeon, but accepted Rivera's plea to the aggravated assault after ascertaining that the accused would have pleaded guilty "even if the assault were treated at law as merely a simple assault."[254]

On appeal, Rivera alleged that his plea was improvident because "an unloaded weapon is not 'dangerous' as that term is used in Article 128(b)(1), UCMJ, contrary to *Sullivan*."[255] The reviewing panel of ACMR agreed that Rivera's plea to aggravated assault was improvident, and affirmed only so much of the finding of guilty as found that Rivera committed a simple assault.[256] *Rivera* reasoned that both federal and military precedent concerning aggravated assault required that a firearm be loaded or used as a bludgeon to be considered a "dangerous weapon" as a matter of law.[257] The ACMR refused to disregard this precedent, as *Sullivan* had done, in favor of civilian case law interpreting a federal penal statute with a substantially different history, purpose, and language than the military aggravated assault statute.[258]

Observations and Critique

The ACMR's decision in *Sullivan* is somewhat perplexing. As a threshold matter, the ACMR's holding is unnecessarily broad. The ACMR began its opinion by stating that they would only consider whether a loaded pistol must be fully functional to be considered as a "dangerous weapon."[259] *Sullivan's* ultimate holding, however, answers a far broader question in that it further defines a "dangerous weapon" as any *apparently* functioning weapon brandished in a threatening manner (regardless of whether it is actually functional or even loaded).[260] The breadth of the ACMR's holding is surprising in light of *Sullivan*. Under the instant facts, the accused had inserted a loaded magazine into the pistol and subsequently chambered a round, all within the full view of his two victims.[261] Consequently, any discussion by the ACMR concerning the brandishing of unloaded weapons was beyond the scope of the facts before the ACMR and should have been mere dicta.[262]

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[252] United States v. Rivera, 40 M.J. 544, 545 (A.C.M.R. 1994).

[253] *Id.*

[254] *Id.* at 546.

[255] *Id.* at 545.

[256] *Id.* at 550.

[257] *Id.* at 546-47.

[258] *Id.* at 548-49. One could argue that *Sullivan's* most egregious omission is its failure to address the differences in the language of the federal bank robbery statute and Article 128(b)(1), UCMJ. The military aggravated assault statute is violated when one assaults another with a "dangerous weapon or other means or force likely to produce death or grievous bodily harm." UCMJ art. 128(b)(1). The wording of the provision of the federal bank robbery statute relied on in *McLaughlin* and *Sullivan* is much broader; it provides for an enhanced sentence of confinement if an individual committing a bank robbery or certain incidental crimes "assaults . . . , or puts in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d) (1988). The differences could be illustrated as follows:

	UCMJ art. 128(b)(1)	*18 U.S.C. § 2113(d)*
Action	Assault	Assaults or Puts Life in Jeopardy
Object	Victim of Assault	Any Person
Means	Dangerous Weapon or Other Means or Force Likely to Produce Death or Grievous Bodily Harm	Dangerous Weapon or Device

In sum, the language of 18 U.S.C. § 2113(d) protects a broader class of persons from a broader range of conduct than does Article 128(b)(1); therefore, it is reasonable that the Supreme Court should adopt a more expansive definition of a "dangerous weapon" under the bank robbery statute than for an aggravated assault. *Sullivan* did not elaborate, however, on why it believed that *McLaughlin*, involving the statutory construction of the terms of the Federal Bank Robbery Act, was binding on the military judiciary in its interpretation of a distinct statutory scheme, the UCMJ. *See* United States v. Sullivan, 36 M.J. 574, 577 (A.C.M.R. 1992).

[259] *Sullivan*, 36 M.J. at 575.

[260] *Id.* at 577. The ACMR's implicit answer to the specified issue was apparently, "No."

[261] *Id.* at 575.

[262] United States v. Rivera, 40 M.J. 544, 548 (A.C.M.R. 1994).

Nevertheless, the ACMR took an aggressive stance concerning the President's power to define what constitutes a "dangerous weapon." The ACMR declared that provisions of the *Manual* and the *Benchbook* that purported to exclude unloaded firearms from the definition of "dangerous weapons" were "no longer valid."[263] The ACMR emphasized that the President's power to promulgate rules of procedure and evidence under Article 36, UCMJ, does not include the power to "create or define elements of an offense."[264] The ACMR concluded that while the President can summarize the elements of a particular offense that have been previously identified by case law, the courts have the responsibility to interpret and apply the provisions of any statute.[265]

The ACMR's assertive posture on this particular issue is difficult to understand in light of the COMA's reasoning in *United States v. Smith*.[266] In *Smith*, the COMA stated that "[w]e are quite undisturbed by the statement . . . that 'an unloaded pistol, when presented as a firearm . . . is not a dangerous weapon, means, or force.'"[267] The COMA reasoned that an unloaded firearm was not "likely to produce death or grievous bodily harm" because "under no conceivable circumstances is it capable of injury."[268] Although Courts of Military Review generally are not free to ignore COMA precedent,[269] in *Sullivan*, the ACMR did not even address the COMA's unambiguous reasoning in *Smith*.[270]

Rivera and *Sullivan* do agree on one point; both cases focused only on the prerequisites that qualify a pistol as a "dangerous weapon," and not the sentence enhancement provisions of an assault "when committed with a loaded firearm."[271] Because the sentence enhancement provisions in the *Manual* are not elements of the substantive offense,[272] the President's power to establish maximum limits to the punishment that a court-martial may direct[273] for the offense of aggravated assault are unaffected by the ACMR's decision in *Sullivan*.

Practice Pointers for Counsel

The ACMR's contradictory opinions in *Sullivan* and *Rivera* contain a number of lessons for counsel. First, trial counsel should proceed cautiously in this area; while an individual arguably may commit an aggravated assault under Article 128(b), UCMJ, merely by brandishing an apparently functional weapon in a threatening manner,[274] the weight of better precedent and legal reasoning is to the contrary.[275] Trial counsel who nonetheless choose to proceed in the face of *Rivera* can take advantage that an "apparently functional weapon" conceivably could include a plastic or wooden replica of an actual weapon that an observer reasonably could conclude was a functional weapon. In cases involving so-called "counterfeit" weapons, the decision to proceed under the

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[263] *Sullivan*, 36 M.J. at 577 n.3 ("In accordance with our holding today, the last sentence in paragraph 54c(4)(a)(ii) of the *Manual* and Note 6 of paragraph 3-109 of the *Benchbook* are no longer valid."). The *Manual* provides, in relevant part, that "an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means or force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded. MCM, *supra* note 69, pt. IV, ¶ 54c(4)(a)(ii). The *Benchbook's* provisions are virtually identical. *See* BENCHBOOK, *supra* note 69, ¶ 3-109 n.6.

[264] *Sullivan*, 36 M.J. at 577 n.3 (citation omitted).

[265] *See id.* Nevertheless, the courts have the responsibility to follow precedent interpreting the statute under consideration, a rule of judicial interpretation that *Sullivan* somewhat overlooks. *See* United States v. Foster, 40 M.J. 544, 549 (A.C.M.R. 1994) (citing Halvering v. Hallock, 309 U.S. 106 (1940)); *see also infra* notes 266-70 and accompanying text. The *Sullivan* panel gave seemingly slight regard to a rule of statutory construction, as well: namely, the rule of lenity. The rule provides that where the legislative intent is not clear as to the meaning and effect of a statutory term and "reasonable minds might differ as to its intention, the court will adopt the less harsh meaning." BLACK'S LAW DICTIONARY 1196 (5th ed. 1979); *see also* United States v. White, 39 M.J. 796, 802 (N.M.C.M.R. 1994). The proper application of the rule of lenity to Article 128, UCMJ, would seem to support the objective assessment, preferred by *Rivera*, of whether an unloaded firearm could ever be a "dangerous weapon" as described by the statute.

[266] 4 C.M.A. 41, 15 C.M.R. 41 (1954).

[267] *Id.* at 47, 15 C.M.R. at 47 (quoting MANUAL FOR COURTS-MARTIAL, United States, ¶ 207a (1951)).

[268] *Id.* at 47, 15 C.M.R. at 47.

[269] United States v. Jones, 23 M.J. 301, 302 (C.M.A. 1987); United States v. Rivera, 40 M.J. 544, 549 (A.C.M.R. 1994).

[270] Interestingly, the ACMR instead relied on the Supreme Court's interpretation of "dangerous weapon" in the federal aggravated bank robbery statute rather than judicial interpretation of the term as contained in the federal aggravated assault statute, 18 U.S.C. § 113(c) (1988). In United States v. Schoenborn, 4 F.3d 1424 (7th Cir. 1993), the Court of Appeals for the Seventh Circuit reasoned that it is the actual capability of an object and the manner in which it is used that determine whether it is a "dangerous weapon" for the purposes of the federal aggravated assault statute. *Id.* at 1432 (quoting United States v. Guilbert, 692 F.2d 1340 (11th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983)). So while the Supreme Court may have shifted to a subjective assessment of what constitutes a "dangerous weapon" for the aggravated bank robbery statute, the circuit courts of appeal still are relying on an objective standard when proceeding under the federal aggravated assault statute.

[271] United States v. Sullivan, 36 M.J. 574, 577 n.2. (A.C.M.R. 1992) The maximum confinement that may be adjudged for aggravated assault when committed "with a loaded firearm" is eight years, while other aggravated assaults are punishable by up to three years confinement. MCM, *supra* note 69, app. 12.

[272] *Sullivan*, 36 M.J. at 576 n.1.

[273] UCMJ art. 56 (1988).

[274] *See Sullivan*, 36 M.J. at 577.

[275] United States v. Foster, 40 M.J. 544, 547-49 (A.C.M.R. 1994).

aggravated assault provision of Article 128(b)(1), UCMJ, should be made only after actual physical inspection of the "counterfeit" weapon to ensure that it looks "apparently functional."

Defense counsel should take advantage of this conflict between the panels and vigorously challenge any prosecution for aggravated assault involving an unloaded weapon.[276] Consider challenging the government's case with a motion to dismiss for failure to state an offense or a motion for a finding of not guilty; the ACMR's opinion in *Rivera* contains a wealth of precedent and legal argument in favor of the position that an unloaded firearm is not a "dangerous weapon" unless it is used as a bludgeon. You are, of course, ethically permitted to make a good faith argument for a modification or reversal of *Sullivan* in light of the unnecessarily broad scope of its holding in regard to unloaded weapons.[277] If your client is found guilty of aggravated assault by using either a "counterfeit" weapon or an actual weapon that is unloaded or nonfunctional, keep in mind that the maximum period of confinement for each specification of aggravated assault remains three, and not eight, years.[278]

Military judges confronted with a situation like that in *Sullivan* or *Rivera* would do well to review the trial judge's actions to protect the record in *Rivera*. In that case:

> [T]he military judge correctly anticipated that the decision in *Sullivan* would likely not be followed on appeal and . . . obtained the appellant's assurance that he would have pleaded guilty even if the assault were treated at law as merely a simple assault. Moreover, he fashioned an appropriate sentence . . . based on the maximum sentence for a simple assault.[279]

Whatever the ultimate resolution of this matter, the military judge can husband judicial resources in the interim by adapting the measures taken in *Rivera* to the situation confronting them.

Finally, all counsel should be on notice that the appellate courts are going to attach minimal persuasive weight to the various provisions of the *Manual* and other administrative publications that are not based on judicial interpretation or application of the relevant statutes.[280] Therefore, before you next argue the plain text of the discussion in the *Manual* on an offense at bar, look for military appellate decisions concerning the statutory words or phrases that support the position promulgated by the President.[281]

Conclusion

The ACMR's conflicting decisions in *Sullivan* and *Rivera* present a major challenge to military justice practitioners; it is, at best, unclear which perspective will ultimately be adopted by the Court of Appeals for the Armed Forces (CAAF). *Sullivan* purports to adopt the position held by a majority of jurisdictions on this issue, but does so by misplaced reliance on a Supreme Court decision interpreting a federal penal statute that is, at best, persuasive authority. *Sullivan* is, in a manner of speaking, right but for the wrong reasons. *Rivera* represents the better position in terms of logic and adherence to precedent, but, nonetheless, is a minority position. Counsel and military judges should be aware of the uncertainty as to what is a "dangerous weapon" for the purposes of the aggravated assault provisions of the UCMJ, and proceed with prudence until the CAAF resolves this issue. Major Barto and First Lieutenant Lucarelli, 135th Basic Course.

International and Operational Law Note

The 1994 United States National Security Strategy[282]

Introduction

United Nations control of United States forces? Economic intelligence gathering? International population control? Cold War planners and purists would have cringed at such

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[276] *See generally* Lynn C. Cobb, Annotation, *Robbery by Means of a Toy or Simulated Gun or Pistol*, 81 A.L.R. 3d 1006 (1977).

[277] *See* DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 3.1 (1 May 1992).

[278] *See Sullivan*, 36 M.J. at 576 n.1. *Cf.* United States v. Henry, 35 M.J. 136 (1992) (firearm that is capable of being "readily converted to expel any projectile by the action of an explosive" is a "firearm" for purposes of sentence enhancement for bank robbery).

[279] *Foster*, 40 M.J. at 545-46.

[280] *Cf.* United States v. Strode, 39 M.J. 508, 511 (A.F.C.M.R. 1993) (referring to the Rules for Courts-Martial as merely "a convenient treatise"); United States v. White, 39 M.J. 796, 801 (N.M.C.M.R. 1994) (the views of the President in promulgating the *Manual* are important but not binding on the courts) (citing United States v. Mance, 26 M.J. 244, 252 (C.M.A.), *cert. denied*, 488 U.S. 942 (1988)).

[281] A good source of precedential authority is found in appendix 21 to the *Manual*, which contains an analysis of most provisions of the parent text; look there for support before even opening a digest.

[282] The White House, *A National Security Strategy of Engagement and Enlargement* (1994) [hereinafter 1994 Strategy]. The document is available for purchase through the United States Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, D.C. 20402-9328.

thoughts in a National Security Strategy.[283] Yet the 1994 National Security Strategy (1994 Strategy) does exactly that as it adjusts United States policy to changes dictated by the post-Cold War world.[284]

Developed by the National Security Council and signed by President Clinton in July 1994, the annual United States National Security Strategy continues Bush administration "engagement" strategies that evolved after Soviet hegemony collapsed in 1989 to 1990. The 1994 Strategy also retains earlier foreign policy themes such as exportation of democracy and "regional" approaches, but further subdivides national security strategy into three categories: Security, Economics, and Democracy. Notably, the strategy expands from traditional notions of national security (such as national defense) into domestic forums such as the environment, research and development, and investment. This note will highlight some of the key points from the 1994 Strategy.

Background to the 1994 Strategy

Post-World War II National Security Strategy was largely structured around George Kennan's 1946 theme of "containment" of the Soviet empire. Then an obscure State Department official stationed in Moscow, Kennan[285] authored the famous "Long Telegram" which correctly warned of Soviet expansionism. In response to Kennan's prophetic warning, the United States embarked on a classified long-term strategy that was memorialized in National Security Council documents 48[286] and 68.[287] The unclassified version, again authored by Kennan, stated that America's answer "was to conduct a long-term, patient but firm and vigilant *containment* of Russian expansive tendencies until either the break up or the gradual mellowing of Soviet power."[288]

From that time—and up until 1990—the United States undertook de facto and de jure *military* strategies to contain the Soviet threat. Implementing Kennan's containment strategy produced assorted administration-driven monikers such as "massive retaliation" and "new look" (Eisenhower), "flexible response" (Kennedy), "detente'" (Nixon), and "conventional build-up" (Reagan and Bush). Understandably, the United States strategy, plans, and budget myopically focused on countering and staying the course against the single most threat to United States security—Soviet (and Chinese) expansionism. Finally, Congress (who wanted more oversight in the national security process), mandated through the Goldwater-Nichols Department of Defense Reorganization Act, that the President *publish* an annual National Security Strategy.

Reacting to the Soviet Empire's implosion in the early 1990s, substantive United States national strategy shifted from "containment" to one of "engagement." The new strategy astutely recognized the threat of regional instabilities caused by the power vacuum left by the Soviet Union and sought to encourage global stability and progress through a multifaceted plan of resolve and deterrence. These transitional strategies also included a proactive focus on achieving national security objectives through political, economic, and military means short of war. Its intent was promotion of peace by addressing

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[283] Indeed, some have.

> This "foreign policy is really domestic policy" fallacy apparently is taken quite seriously by the administration, and even is expanded to include items such as world population growth, environmental degradation, deforestation, ozone depletion and climate change as trendy new additions to a laundry list "threats to U.S. security." This, in a document that has traditionally been devoted to such (apparently mundane) issues as conventional force structure, strategic defense, and balance of power.

Lawrence Di Rita, *President's Touchy-Feely "National Security Strategy"* ARIZ. REPUBLIC, Sept. 18, 1994, at E5.

[284] According to major newspapers, the 1994 Strategy is the result of much internal debate and compromise between the Department of State and the Department of Defense. "Defense officials, mainly senior officers but also some civilians, said they had struggled against what they described as the State Department's greater emphasis on the 'soft power' of diplomacy and economic and cultural relationships . . . ." A senior administration official responded that it was not a question of "military versus diplomacy" but "of how you describe and order your national security interests—along national security lines that a typical military planner would want, or a version that would include that but add economic security, global and environmental issues and other imperatives." John Lancaster & Barton Gellman, *National Security Strategy Paper Arouses Pentagon, State Department Debate*, WASH. POST, Mar. 3, 1994, at A14.

[285] Kennan was the United States Charge' d' Affairs in Moscow in 1946 when he received a telegram from the United States Department of State asking him, in part, "We would welcome receiving from you an interpretive analysis of what we may expect in the way of future implementation of these announced policies . . . ." Kennan's lengthy and inciteful response, later known as "The Long Telegram" would shape United States thinking and strategy for the next four decades.

[286] NSC 48/2 integrated many of Kennan's containment theories. Implemented in December 1949, the document also authorized the United States to "exploit, through appropriate political, psychological, and economic means, any rifts between the Chinese Communists and the USSR and between the Stalinists and other elements in China, while scrupulously avoiding the appearance of intervention. Where appropriate, covert as well as overt means should be utilized to achieve those objectives." Michael D. Krause, *National Strategy Implementation: A Historical Perspective, in* GRAND STRATEGY AND THE DECISIONMAKING PROCESS 77, 86 n.7 (James C. Gaston ed. 1992) (citing JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY 69 (1982)).

[287] NSC 68 (*Report to the National Security Council* by The Executive Secretary on United States Objectives and Programs for National Security April 14, 1950) was written in response to President Truman's request for policy recommendations after it was learned that the Soviets had detonated a nuclear device in August 1949. "It was never formally approved by President Truman; but the doctrine set forth in a memorandum had a great influence on U.S. national security policy—particularly following the invasion of South Korea in June 1950. Although originally highly classified, the essence of the document was made public long before it was officially declassified by Henry Kissinger in 1975." John Norton Moore, *NSC-68 Background Note, in* NATIONAL SECURITY LAW DOCUMENTARY SUPPLEMENT, at 51 (1994).

[288] George F. Kennan, writing as "X" in *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566 (July 1947) (emphasis added).

root causes of regional instability—thus reducing the need for direct United States combat intervention.

Substantive underpinnings of the 1994 strategy—security, economics, and democracy—also use proactive methodologies developed in the early 1990s. A key difference, however, is the strategy's emphasis on domestic issues.[289] "The strength of our diplomacy, our ability to maintain an unrivaled military, the attractiveness of our values abroad—all these depend in part on the strength of our economy."[290] Other key points are paraphrased and quoted below. Notably, some announced goals of the strategy, such as restoration of democracy in Haiti, already have been accomplished.

United States Security[291]

The first category of the 1994 Strategy stresses the government's responsibility for protecting the lives and personal safety of its citizens, for maintaining their political freedom and independence, and for providing for the well being and prosperity of the nation. The 1994 Strategy recognizes that the United States cannot do this unilaterally, and, therefore, will seek to influence collective decision making in world affairs. To maintain credibility in international decision making, the United States will, however, maintain a strong defense capability.

Responding to Major Regional Contingencies

United States forces, with allied enhancements, will maintain their capability to fight and win in two nearly simultaneous *major regional conflicts*. Areas of potential conflict that United States forces will specifically plan for are the potentially hostile regional powers, such as North Korea, Iran, and Iraq. The rationale of planning a response to two nearly simultaneous conflicts ensures that one aggressor, Iraq for example, will not take advantage of a United States commitment elsewhere (Haiti, for example). Another reason for this goal is to ensure that the United States has sufficient resources to deter or defeat a coalition of hostile forces or of a larger, more capable adversary than foreseen today.[292]

Maintaining a Credible Overseas Presence

The United States will maintain a robust overseas military "presence" to give form and substance to its bilateral and multilateral security commitments. Presence not only reflects a national determination, but also provides forward elements for rapid response. Furthermore, forward presence enhances effectiveness of coalition operations—working with allies in peacetime forges relationships that come to fruition in war. Overseas presence also facilitates regional integration. For example, some nations may not be willing to work together independently, but will "coalesce" around the United States in a crisis.[293] The United States also will maintain a credible overseas presence through security assistance programs and judicious use of foreign military sales programs.

Counter-Terrorism[294]

The 1994 Strategy serves notice to terrorists that as long as they strike at United States citizens and interests, the United States will dedicate forces whose sole goal is to combat them. The United States continues its policy of not giving concessions to terrorists and reserving the right to strike terrorists at their bases or at assets valued by supporting governments. The United States also will seek to exploit all legal mechanisms designed to counter terrorist activities.

Countering the threat of terrorists with access to weapons of mass destruction is an area of principal concern. To increase United States effectiveness in this area, the 1994 Strategy calls for increased cooperation between the agencies of the Department of Justice, the Central Intelligence Agency, and world-wide counterterrorist organizations.

New activities on the terrorism front include the following:

- sanctions against Libya for its role in the bombing of Pan Am flight 103;
- an international convention for detecting and controlling plastic explosives; and
- two new counterterrorism treaties, one for the suppression of unlawful acts of violence at airports serving international aviation, the other for suppression of unlawful attacks against safety of maritime navigation.

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[289] One nationally syndicated writer remarked that "[the 1994 Strategy] can serve as the basis for 'great debate' hearings when Richard Lugar becomes chairman of Senate Foreign Relations in January. That's because the strategy has become so determinedly anti-controversial that it should provoke controversy." William Safire, *Clinton's "Controversial Foreign Policy,"* HOUSTON CHRON., Aug. 29, 1994, at A10.

[290] 1994 Strategy, *supra* note 282, at 15.

[291] *Id.* at 6. The remaining paragraphs are largely paraphrased from the original text. Page numbers from significant sections will, however, be cited.

[292] One Russian officer, General Lebed of the 14th Army (which is deployed in the Dniester Republic), interprets the 1994 Strategy by stating "political changes in Russia that do not suit the Americans automatically make Russia No. 1 enemy for the United States." On the United States Army's role, he interprets the 1994 Strategy to say "they are fully determined to fight in ill-defined situations capable of being interpreted at will." Alexander Minkin, *Peace is War,* MOSKOVOSKY KOMSOMOLETS, Oct. 26, 1994, at 1, 2.

[293] 1994 Strategy, *supra* note 282, at 8.

[294] *Id.*

Fighting Drug Trafficking[295]

The United States will shift from an emphasis of transit interdiction to a *more balanced effort with source countries.* The 1994 Strategy recognizes that fragile political infrastructures and lack of economic alternatives in source countries nurture a strong drug trade. The goal is to support source countries in building institutions that make it harder for drug traffickers to operate.

Noncombatant Evacuation Operations[296]

The United States remains committed to protecting the lives of its citizens overseas.

Security Assistance[297]

In twenty-five countries, the United States has small teams which provide, and will continue to provide, training and advice to friendly governments threatened with subversion.

Disaster Relief[298]

United States forces will continue, if practicable, to contribute their assistance in response to natural disasters.

Space[299]

Much of the 1994 Strategy is devoted to space. In short, the strategy reemphasizes the United States goal to continue its position as the major economic, political, technological, and military power in space.

Deciding When and How to Employ United States Forces[300]

The 1994 Strategy declines to specify in advance the specific circumstances that will trigger United States force commitments. But it does announce certain general principles (listed below) that will guide United States decision-makers regarding commitment of forces.

United States National Interests

What is at stake? This involves a balancing of costs and risks of military involvement against the stakes involved. Events that have broad, overriding impact on the United States as a national entity will rate decisive use of force (even unilaterally). Situations that pose less immediate threat—refugee flows, commitments to allies, and economic investment—are targeted selectively.

Other Considerations Before Committing Military Forces:

- Did the United States consider nonmilitary means that offer a reasonable chance of success?
- What forces should be used for the mission and do these forces match our military objectives?
- Does the commitment of forces enjoy a reasonable amount of support from the American people and their elected representatives?
- Does the commitment meet reasonable cost and feasibility thresholds?
- Is there a proportional commitment from allies?

Combatting the Use and Spread of Weapons of Mass Destruction and Missiles[301]

These weapons pose serious risks, not only to the United States, but also to overall world security. In responding to this threat, the United States (which is reviewing its own nuclear posture) *will* maintain its strategic nuclear capability to deter potential threats from those with weapons of mass destruction as well as placing a high priority on perfecting capabilities to locate, identify, and disable arsenals of weapons of mass destruction.

The United States also will consider a country's compliance with nuclear nonproliferation and counterproliferation treaties in judging the nature of its bilateral relations with that country. Other United States goals include extension of the Nuclear Nonproliferation Treaty beyond 1995, reduction of world stocks of fissile materials, a comprehensive test ban treaty, and ending the unsafeguarded production of fissile materials (which can be done by strengthening the Nuclear Suppliers Group and the International Atomic Energy Agency).

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[295] *Id.* at 9.

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] *Id.* at 9, 10.

[300] *Id.* at 10.

[301] *Id.* at 11.

Chemical Weapons. The 1994 Strategy urges ratification of the 1993 Chemical Weapons Convention. This Convention prohibits the production, stockpiling, and use of chemical weapons. It also has a comprehensive international inspection and verification regime. This convention departs from past United States positions of reserving the right to respond with chemical weapons if the other side used them first. The 1994 Strategy also recommends stronger domestic export controls and methods to ensure compliance with the 1972 Biological Weapons Convention.

Delivery Systems. The United States seeks to broaden membership in the Missile Technology Control Regime (MTCR). Although Brazil recently has joined, the most immediate challenge remains in formalizing China's earlier undertakings to the MTCR.

The Trilateral Accord. The United States will continue its relationship with Russia and the Ukraine in transferring nuclear warheads from Ukraine to Russia in exchange for fair compensation.

Arms Control. Arms control limits the spread of nuclear, biological, and chemical weapons and contributes to a more stable and calculable balance of power. The United States will push to enhance the United Nations Conference on Disarmament in Geneva—recognizing that arms control often averts arms races in certain categories. The United States also will push, through efforts in the United Nations, greater transparency, responsibility, and restraint, in the areas of conventional arms sales.

Peace Operations[302]

The United States views peace operations as a means to support the National Security Strategy—not as a strategy unto itself. Peace operations range from peacekeeping to peace enforcement. Under this strategy, the United States will consider the following factors before committing to a peace operation:

- What is the international threat to peace and security?
- What is the United States interest?
- What is the objective?
- What is the availability of necessary resources?
- What is the operation's endpoint or criteria for completion?

Command and Control. The 1994 Strategy recognizes that the President will never relinquish constitutional command authority over United States forces. There may, however, be times when it is in United States interests to place United States troops under the *operational* command of a competent United Nations or allied commander.

Strong Intelligence Capabilities[303]

The Cold War's end broadened, rather than narrowed, the definition of national security. Consequently, United States information gathering systems continue to monitor (and give timely warning) of strategic threats such as missile launches and deployments of weapons of mass destruction, but now also focus on *economic* intelligence. This will enhance United States trade negotiations and protect United States companies from foreign intelligence services and unfair trading practices. Other intelligence missions and goals include:

- more timely intelligence support to end users such as the military;
- early warning of potential crises—to ensure that the United States may employ adequate diplomacy;
- strengthened international intelligence relationships;
- focused intelligence support to law enforcement agencies—especially in the areas of drug interdiction, illegal technologies, and counterterrorism.

The Environment[304]

Increasing competition for dwindling reserves of uncontaminated air, arable land, fisheries, food sources, and water—once considered "free" goods—is already a very real risk to regional stability around the world. Rapid and unsustainable population growth further exacerbates this complicated problem. Therefore, present decisions about the environment will continue to receive serious attention, because they portend far-reaching national security consequences for the future.

Promoting Prosperity at Home[305]

Expanding on the 1993 National Security Strategy that "[n]ational prosperity and national security are mutually-sup-

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[302] *Id.* at 13.

[303] *Id.* at 14.

[304] *Id.* at 15.

[305] *Id.*

portive goals," the 1994 version includes a domestic economic blueprint that departs from some of the goals stated in the 1993 Strategy. For example, the 1993 Strategy included the following economic goals:[306]

- strengthening economic competitiveness through sound monetary and fiscal policies;
- improving the infrastructure and educational system;
- ensuring United States lead in crucial technologies;
- convincing others that free trade is better than managed trade or protected markets;
- supporting market economies;
- lowering the federal deficit;
- having economic growth coupled with low inflation and stable prices;
- greater national savings;
- promoting increased investment—especially in research and development;
- reducing the burden of taxation, regulation, and litigation;
- raising educational performance and implementing reforms to enhance parental control and choice; and
- greater efficiency in the use of energy.

The 1994 Strategy has similar themes, but deletes opposing political philosophies of "enhancing parental control and choice" in education and "reducing the burden" in taxation. A synopsis of the 1994 economic plan is as follows:

Enhancing American Competitiveness[307]

The following subgoals will help increase United States international economic competitiveness:

- reducing the deficit;
- investing in technology;
- assisting in defense conversion; and
- structuring defense research and development toward dual-use technologies.

Partnership with Business and Labor[308]

Stating that the "private sector is the engine of economic growth, the strategy views government's role as a business advocate that seeks to help boost American exports by reforming the export licensing system and "leveling the playing field in international markets." Licensing reform, it is hoped, will remove vestigial Cold War barriers that inhibit trade, but at the same time will prevent proliferation of weapons of mass destruction.

Enhancing Access to Foreign Markets[309]

To compete abroad, United States firms should have access to foreign markets in the same manner that foreign industries have access to our markets. Steps taken to gain access to foreign markets include the following:

- The North American Free Trade Agreement (NAFTA). Signed in December 1993, NAFTA will, says the strategy, "create more than 200,000 American jobs . . . and . . . increases Mexico's capacity to cooperate with [the United States in such issues as] the environment, narcotics trafficking, and illegal immigration."[310]
- Asia Pacific Economic Cooperation (APEC). The Pacific Rim "presents vast opportunities for American Enterprise."[311] In November 1993, the President attended the first ever summit of the APEC. United States initiatives would "open new opportunities for economic cooperation and permit U.S. companies to become involved in substantial infrastructure planning and construction . . . ."[312]

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[306] The White House, *National Security Strategy of The United States* 10 (1993). This document, a product of former President Bush's administration, is available for purchase through the United States Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, D.C. 20402-9328.

[307] 1994 Strategy, *supra* note 282, at 15.

[308] *Id.*

[309] *Id.* at 16.

[310] *Id.*

[311] *Id.*

[312] *Id.*

- Uruguay Round of General Agreement on Trade and Tariffs (GATT). Purported as the "most comprehensive trade agreement in history,"[313] highlights include continued cuts in tariff rates throughout the world and application of international trade rules to services and intellectual property.

- United States-Japan Framework Agreement. In July 1993, President Clinton and Japanese Prime Minister Miyazawa agreed to a United States-Japan Framework for Economic Partnership for the purpose of correcting trade inequities between the two countries. Japan has yet to fulfill key commitments made at that time.

Strengthening Macroeconomic Coordination[314]

The 1994 Strategy, as did 1993's, recognized the importance of the G-7 macroeconomic coordination. The 1994 Strategy specifically calls for continued work through the G-7 "heads of state" to seek growth-oriented policies that "complement" United States deficit reduction efforts.

Providing for Energy Security[315]

The need for conservation and development of alternative energy sources continues. Forty percent of United States energy comes from oil. Forty-five percent of United States oil is imported, with a large share coming from the Persian Gulf area. "Conservation measures notwithstanding, the United States has a vital interest in unrestricted access to this critical resource."[316]

Promoting Sustainable Development Abroad[317]

One of the key aspects of ensuring a long-term domestic economic growth is environmentally based decision making. "Companies that invest in energy efficiency, clean manufacturing, and environmental services today will create the high quality, high wage jobs of tomorrow."[318] On the international level, the administration foreign assistance program is centered around four growth sustaining elements: broad-based economic growth, the environment, population and health, and democracy.

Promoting Democracy[319]

America's strategic interests (prosperity at home and the check of global threats) are served by enlarging the community of democratic and free market nations. The good news, according to the strategy, is that the past ten years reflects a global shift toward democratic forms of government. The United States strategy of enlarging this trend "is not a democracy crusade; it is a pragmatic commitment to see freedom take hold where that will help U.S. most."[320] Target areas include states that have United States strategic impact such "as those with large economies, critical locations, nuclear weapons, or the potential to generate refugee flows into our own nation . . . or allies."[321] Understandably, Russia is considered a key state in this approach. Substrategies for promotion of democracy include:

- continuing to adhere to and promote human rights;
- giving emerging democracies the full benefits of free market economies; and
- including nongovernmental organizations as allies toward the goal of enlarging democratic forms of government.

Integrated Regional Approaches[322]

Europe and Eurasia

United States goal: integrated democracies cooperating with the United States to keep the peace and promote prosperity. As the conflict in the former Yugoslavia reveals, "[t]he Cold War is over, but war itself is not over."[323]

313 *Id.*

314 *Id.* at 17.

315 *Id.*

316 *Id.*

317 *Id.* at 17, 18.

318 *Id.* at 18.

319 *Id.*

320 *Id.* at 19.

321 *Id.*

322 *Id.* at 21.

323 *Id.*

Four subgoals for United States policy on the former Yugoslavia are as follows:

- preventing the spread of war;
- stemming the flow of refugees;
- preventing the slaughter of innocents; and
- helping to confirm NATO's central role in post-Cold War Europe.

East Asia and the Pacific[324]

United States goals are as follows:

- combating the proliferation of weapons of mass destruction (Korea in particular);
- capping, reducing, and ultimately eliminating Pakistan's and India's nuclear and missile capabilities;
- developing new arrangements to meet the multiple threats in the pacific; and
- supporting the wave of democratic reform sweeping the region (China and Burma are examples).

The Western Hemisphere[325]

United States goals are as follows:

- resolving border tensions;
- controlling insurgencies and the concomitant pressure for arms proliferation;
- integrating promotion of democracy, trade ties, and sustainable development;
- reversing the military coup in Haiti and restoring democracy (accomplished); and
- adhering to the Cuban Democracy Act (a United States policy of peaceful establishment of democracy in Cuba).

The Middle East, Southwest, and South Asia[326]

United States goals are as follows:

- assuring the security of Israel and Arab friends;
- ensuring the free flow of oil at reasonable prices;
- enhancing collective security arrangements so that an aggressor state will not emerge and threaten the independence of neighboring states; and
- containing Iraq and Iran.

Africa[327]

United States goals are as follows:

- helping to support democracies and emerging democracies through sustainable economic development and conflict resolution such as negotiation, diplomacy, and peacekeeping;
- focusing on root causes of conflicts and disasters before they erupt; and
- using short-term, clearly defined peacekeeping and expanding use of nongovernment/government cooperation.

Lieutenant Colonel Winters.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adapt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome notes for inclusion in this portion; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Notes

Property Accumulations During Separation

Parties to separation agreements drafted in military legal assistance offices frequently are preoccupied with the legal

[324] *Id.* at 23.

[325] *Id.* at 24.

[326] *Id.* at 25.

[327] *Id.* at 26.

impact of an agreement on their social activities. Specifically, many clients want to know if postseparation agreement sexual activity is considered adultery.[328] A recent Illinois case, *In re Morris*, illustrates that parties also should consider the impact of separation on the accumulation of property.[329]

Morris involved a divorce case filed by a man who had been separated from his wife for twenty-four years. Prior to their separation, the couple had been married for two years. At issue was what share, if any, the wife should receive in the husband's sixty-five percent share of a recent 2.9 million dollar lottery jackpot. Finding for the husband, the trial court concluded that although the lottery winnings were marital property, they were not divisible because they were not the result of a "shared enterprise."[330]

The appellate court reversed, holding that the failure of the trial court to award the wife any share of the lottery proceeds effectively acknowledged the existence of a common law divorce. While the trial court might have concluded a less than equal share was appropriate, the appellate court held that the parties' extended marriage must be taken into consideration as a matter of law and public policy.[331]

Most legal assistance practitioners are aware that soldiers and their spouses frequently separate for reasons other than deployments and unaccompanied tours. Some separate after executing a written separation agreement, some do not. Many of those who separate wait for years without initiating a divorce action. Particularly for those who do not contemplate remarriage, separation appears to be a reasonable way to ensure that military benefits remain available to the spouse. What seems reasonable at first, can become inherently unattractive, however, if the prospect of sharing postseparation property accumulations is considered.

Although not every soldier who separates from their spouse will win the lottery, many eventually will qualify for retirement pay, which states can divide as marital property. Accordingly, legal assistance practitioners should consider, as an important factor, the potential for sharing retired pay equally with a spouse who has been separated from a soldier. Major Block.

Smoking and Child Custody Determinations

Without ruling that smoking alone can form a basis for not awarding custody to a parent, a recent New Jersey court ruled that smoking is a factor that may be considered in making a custody award.[332] In *Unger v. Unger*, the court was asked to reconsider a custody order based on the impact of "environmental tobacco smoke" (ETS) on children in the custody of their mother, a long-term smoker. Finding that ETS affects the safety and health of the children, the court determined that it was an appropriate factor to consider in making a custody determination.[333]

While the court did not remove the children from custody of the mother, it did order her to refrain from smoking in her car or house while the children are present, and for ten hours before the children are present.[334] Legal assistance attorneys need to sensitize their clients that custody determinations are based on more than simply identifying the primary care provider. Instead, consideration of a full range of factors, including smoking, that focus on determining what is in the best interests of the child(ren), should be anticipated. Major Block.

Consumer Law Note

Defenses to Involuntary Allotments for Creditor Judgments—Implementing the Hatch Act Reform Amendments

The Hatch Act Reform Amendments (HARA) directed the Secretary of Defense to promulgate regulations implementing involuntary allotments to satisfy creditor judgments. The Secretary has published DOD Directive 1344.9 and DOD Instruction 1344.12 to become effective on 1 January 1995.[335] This note addresses the two defenses that the HARA explicitly mentions. A future note will explore other possible theories that a legal assistance attorney (LAA) might use in framing a

[328] For those who have not encountered this issue, no legal action short of divorce is a defense to an adultery charge. Sexual relations between husband and wife subsequent to execution of a separation agreement may affect the agreement under a reconciliation clause.

[329] 21 Fam. Law. Rep. (BNA) 1011 (Ill. Ct. App. 1994).

[330] *Id.*

[331] *Id.*

[332] Unger v. Unger, 20 Fam. Law. Rep. (BNA) (N.J. Sup. Ct. 1994).

[333] *Id.*

[334] *Id.*

[335] DEP'T OF DEFENSE, DIRECTIVE 1344.9, INDEBTEDNESS OF MILITARY PERSONNEL, para. F (27 Oct. 1994) [hereinafter DOD Dir. 1344.9].

defense for a soldier. These additional defenses, however, are included in the DOD Instruction.[336]

The statute provides for two defenses.[337] The first defense is that the creditor did not comply with the statutory provisions of the Soldiers' and Sailors' Civil Relief Act (SSCRA) in obtaining the underlying judgment.[338] Additionally, the statute provides a defense if "military exigency" caused the service member's absence from a court proceeding that provided the basis of the underlying judgment.[339] Although the statute fails to define military exigency, the directive does.[340] These two defenses may provide the LAA with a considerable arsenal.

The first defense requires full compliance with the *procedural* provisions of the SSCRA. Both the HARA and its legislative history are silent as to the specific sections that the creditor must follow. Several possible sections of the SSCRA, focusing on court procedure, should be crucial to any court case. These include the provisions providing procedural protection from default judgment and the SSCRA stay provisions.[341] The strongest defenses to involuntary allotments may lie in violations of the default judgment provisions.

Under 50 U.S.C. Appendix § 520(1), every plaintiff applying for a default judgment must file an SSCRA affidavit.[342] The affidavit must state whether the defendant is a person in the military service.[343] If the plaintiff is unable to find out whether the defendant is in the service, the plaintiff must file an affidavit stating this inability.[344] On receiving an affidavit stating the defendant is in the service, the trial judge *must* appoint an attorney to represent the interests of the absent soldier.[345] Court decisions interpreting these provisions have held, however, that failure to comply with either of these provisions renders the judgment *voidable*, not void.[346] Consequently, unless the soldier takes affirmative steps to reopen the judgment under the SSCRA, it remains a valid judgment, fully enforceable in subsequent civil proceedings.[347]

Should a judgment that is *voidable* under the SSCRA be *enforceable* under the HARA? Neither the legislation, nor its legislative history fully answers this question.

When Senator Craig originally introduced the Garnishment Equalization Act in 1993, it did not contain any special provisions for military personnel. However, as noted by Senator Pryor during the HARA floor debate in July 1993, the Department of Defense expressed "deep concern, grave concern" that the legislation did not adequately address the "unique situation" of military personnel.[348] Thus, we can argue that the regulations were to provide a *greater* degree of protection than the SSCRA. Senator Pryor stated, "[t]his amendment [involuntary allotment], . . . incorporates by reference the protections of the Soldiers and Sailors Relief Act of 1940. It goes a step further in requiring that the Secretary's regulations recognize those differences of military duties that may not be

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[336] As originally published, Draft DOD Directive 1344.9 contained numerous defenses. *See* 59 Fed. Reg. 21713, 21718 (1994) (defenses included, *inter alia*, that the application was erroneous, that the judgment has been satisfied, that a legal impediment exists, such as bankruptcy, that the creditor is in "off-limits" status, and "other" appropriate defenses). *Id. See also*, Legal Assistance Note, ARMY LAW., Nov. 1994, at 50 (all DOD Directives will be divided into "Directives"— including broad policy guidance and "Instructions"— including "nuts-and-bolts" guidance). DEP'T OF DEFENSE, INST. 1344.12, INDEBTEDNESS PROCESSING PROCEDURES FOR MILITARY PERSONNEL (18 Nov. 1994), para. F.2.b.(3)(d), contains these other defenses, with the exception of the "off-limits" defense. As of 5 December 1994, Army guidance had not been published. It, however, is not likely to include any additional defenses.

[337] Hatch Act Reform Amendments § 9, 5 U.S.C.A. § 5520a(k)(1)-(2) (West Supp. 1994).

[338] *Id.* § 5520a(k)(2)(A).

[339] *Id.* § 5520a(k)(2)(B).

[340] *Compare* DOD Dir. 1344.9, *supra* note 335, encl. 2, para. 4 *with* 5 U.S.C. § 5520a(k)(2)(B) (West Supp. 1994).

[341] *See* 50 U.S.C. app. § 520(1) (1988) (a plaintiff requesting a default judgment must file an affidavit with the court stating whether the defendant is in the service or not). Under 50 U.S.C. Appendix § 520(3), the court must appoint an attorney to represent the interests of an absent service person in the default judgment action. 50 U.S.C. § 521 allows a service person to request a stay of proceedings if military service materially affects the ability of the service person to appear and defend his or her interests.

[342] 5 U.S.C. § 520(1) (1988). The statute states that an affidavit must be filed in every default judgment request. Anecdotal evidence suggests this procedure often is overlooked. In any regard, the law is clear that, although the SSCRA requires the affidavit in every case, the omission only will effect judgments against service persons. *See* Vision Services Plan of Pennsylvania v. Pennsylvania AFSCME Health and Welfare Fund, 474 A.2d 339 (Pa. Super. 1984) (failure to file affidavit not defective where defendant not a member of the protected SSCRA class).

[343] 5 U.S.C. § 520(1) (1988).

[344] *Id.*

[345] *Id.* § 520(3).

[346] *See, e.g.*, Krumme v. Krumme, 636 P.2d 814 (Kan. 1981) (judgments in violation of the SSCRA are merely voidable, not void).

[347] *See, e.g.*, Rentfrow v. Wilson, 213 A.2d 295 (D.C. Ct. App. 1965) (Virginia default judgment valid in the District of Columbia even if voidable in Virginia where defendant had not sought to set aside in Virginia).

[348] 139 CONG. REC. S8696 (daily ed. July 14, 1993) (statement of Sen. Pryor).

covered by the 1940 act."[349] However, it is unclear if the "step further" meant greater compliance with the SSCRA, or if Congress intended it to relate to the "military exigency" language that the amendment added.[350]

The comments of Senator Craig, the chief sponsor of the amendment, provide some additional support for the proposition that current enforcement of the SSCRA was insufficient to adequately protect service members. He said, "[w]hile I think part of the answer to all of this certainly lies in the Soldiers and Sailors Civil Relief Act, it was the military's concern that was not as complete as it ought to be as it relates to the whole of [the Garnishment Equalization Act]."[351]

Under an interpretation relying on the comments of these senators, the HARA could provide more procedural protection for soldiers than the SSCRA standing alone. Congress charged the Department of Defense with creating involuntary allotment regulations requiring compliance with the SSCRA. Interpreting the statute and the directive in a light most favorable to the soldier, the HARA might preclude enforcement of judgments that violate the SSCRA. Arguably, a soldier who fails to appear in court, for good reason, *or no reason*, could challenge initiation of the involuntary allotment *if* the judgment creditor fails to comply with the SSCRA requirements.

Practically speaking, this protective interpretation of the HARA creates a lower burden for the soldier. To stop the involuntary allotment, the soldier might only have to prove that the creditor failed to follow all the procedures of the SSCRA. While this only makes the judgment voidable, under the SSCRA, it could, effectively, make it *unenforceable* through involuntary allotment. Because pay is the single largest asset of many soldiers, the creditor loses the ability to reach it as a remedy. A creditor wishing to pursue the allotment remedy would have to go back to the court issuing the judgment and seek to have it reopened and comply with the SSCRA.

Legal assistance attorneys must keep themselves abreast of the interpretation and implementation of this provision by the Defense Finance and Accounting Service and the individual services. Violations of the SSCRA may prove to be an effective defense to bar collection through involuntary allotments.

The second defense under the HARA relates to absences from court proceedings because of exigencies of military service. As noted above, this may be a new protection that the HARA grants *beyond* the SSCRA. Although not immediately apparent, this provision may reinforce the stay provisions of the SSCRA.

The SSCRA allows soldiers to request a stay of proceedings at any stage of the case.[352] Courts examining this SSCRA provision generally hold that soldiers will have the burden of establishing two elements to qualify for the stay.[353] First, soldiers must prove that military service prevents their appearance in court. Secondly, soldiers must show that the inability to appear—because of military reasons—materially affects their ability to defend their legal interests.[354]

The HARA defense may prove simpler. The HARA merely requires a finding that "military exigency" caused the absence of the service member from the hearing. Department of Defense Directive 1344.9 further defines absence to include: failure to physically attend, lack of an "appearance," failure to be represented by an attorney of the member's choosing, or failure to respond to pleadings.[355] The HARA does not require a showing that the military exigency materially affected the ability of the soldier to appear in court to bar the imposition of the involuntary allotment. This may considerably reduce the burden of the service member seeking to

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[349] *Id.*

[350] *See Id.* at S8695.

[351] *Id.* at 8696.

[352] 50 U.S.C. app. § 521 (1988).

[353] The Supreme Court stated that the trial court has discretion in imposing the burden of proof in interpreting § 521 of the SSCRA. Boone v. Lightner, 319 U.S. 561, 569-70 (1943). However, as a practical matter, the burden is on the service person to establish, at a minimum, a military reason preventing his or her appearance. *See* Palo v. Palo, 299 N.W.2d 577 (S.D. 1980) (court refused stay where soldier defendant made no showing of military reason for absence other than mere assignment to Germany; soldier plaintiff took emergency leave and emergency loan to appear in court), Lackey v. Lackey, 278 S.E.2d 811 (Va. 1981) (sailor at sea who sent affidavit from commanding officer detailing length and location of deployment entitled to stay).

[354] Courts have found that soldiers were not a necessary party to the proceeding, Bubac v. Boston, 600 So.2d 951 (Miss. 1992) (soldier father not necessary party to dispute between soldier's mother—currently with custody—and soldier's ex-spouse). In other regards, courts have found that the action before the court was inherently temporary and the service member's presence was not necessary based on the ability to reopen the judgment later. *See* Shelor v. Shelor, 383 S.E.2d 895 (Ga. 1989) (temporary child support).

[355] DOD Directive 1344.9, *supra* note 335, encl. 2, para 1. At first blush, it may appear that a soldier who is represented by a court-appointed attorney may be able to argue that he or she did not appear. This result, while, perhaps, attractive to the soldier, abuses the purpose of the statute. The SSCRA *requires* appointment of an attorney. 50 U.S.C. app. § 520(1). It does not require appointment of an attorney satisfactory to the soldier. Department of Defense Instruction 1344.12, paragraph F.2.a.(4)(e), states the requirement of representation by an attorney of the member's choosing, or compliance with the SSCRA, in the alternative. Consequently, compliance by appointment of the "stranger" attorney is, arguably, satisfactory.

avoid the imposition of the allotment. Furthermore, the directive defines "military exigency" in broad terms. The definition includes a full range of situations from combat to deployment.[356]

How will this HARA defense assist soldiers who request stays? Although this provision may not benefit soldiers directly, indirectly it may discourage creditors from opposing soldier-debtor requests for stays under the SSCRA. If a soldier-debtor requests a stay for valid military reasons, but does not, or cannot, show "material effect," a court could properly deny a request for stay.[357] However, under the HARA, a subsequent judgment may prove *unenforceable*. Therefore, a creditor proceeding to judgment, over a request for stay based on military exigency, may win a very hollow and largely, unenforceable, victory.

Legal assistance attorneys must make their clients aware that these defenses do not affect the validity of the underlying judgment. A successful defense against the involuntary allotment merely suspends the ability of the creditor to pursue one statutory remedy. It does not invalidate efforts to pursue the remedies of seizure and sale of property, or the imposition of liens, where applicable. These defenses also do not affect the validity of the judgment under the SSCRA itself. Soldiers seeking to invalidate improperly rendered judgments must still seek relief from the appropriate court.

Beyond the HARA defenses, LAAs must not ignore other valid means of protecting their clients' interests. Creditors frequently seek, among other remedies, to attach the bank accounts of debtors. Before or after requesting an involuntary allotment, a creditor may seek to attach funds deposited in the soldier's bank account. A simple, legal, tactic is to open a new account and redirect pay into that account.[358]

Congress designed the HARA to give creditors greater access to the pay of government employees. However, the Act provides broad authority to ensure that soldiers and other service personnel are protected from violations of the SSCRA. To pessimistic creditors, this authority presents the potential for ineffective implementation of the remedy Congress intended—access to pay. For the service member, however, heightened awareness among creditors and increased compliance with the SSCRA may be on the horizon. Major McGillin.

Veterans' Law Note

NCESGR-Provided Training Materials

Legal assistance attorneys should be aware that the National Committee for Employer Support of the Guard and Reserve (NCESGR) has prepared two documents on the new veterans' reemployment law—the Uniformed Services Employment and Reemployment Rights Act of 1994. For further information, refer to the Guard and Reserve Affairs Items section located in this issue. Captain Jones.

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[356] DOD Dir. 1344.9, *supra* note 335, encl. 2, para. 4. The directive gives the following definition for exigencies of military duty:

> A military assignment or mission-essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a member of the Military Services from appearance at a judicial proceeding or prevents the member from being able to respond to a notice of application for an involuntary allotment. Exigency of military duty is normally presumed during periods of war, national emergency, or when the member is deployed.

Id.

[357] Failure to obtain a stay often results in judgment against the soldier. *See, e.g.*, Palo v. Palo, 299 N.W.2d 577 (S.D. 1980) (court denies stay for failure to show material effect and renders judgment for spouse); Riley v. White, 563 So.2d 1039 (Ala. Civ. App. 1990) (soldier ignores court process, is reassigned to Germany; request for stay denied with paternity judgment rendered against soldier).

[358] *See, generally* NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTION § 15.1-15.3 (2d ed. 1991) (right of creditor to seize funds may be limited by joint ownership, state laws on set-off, and due process considerations).

Tort Claims Note

Equitable Tolling of the Statute of Limitations

For many years, the United States Army Claims Service (USARCS) has maintained that the two-year statutes of limitations (SOL) in the Federal Tort Claims Act (FTCA),[1] and the Military Claims Act (MCA),[2] are jurisdictional and not subject to waiver. This represented the position of the Department of Justice (DOJ) and federal courts.[3] Recent case law has muddied these previously clear waters.

Claimants made various inroads over the years into the FTCA SOL. In certain cases, the courts held that the SOL was tolled when the claimant lacks capacity, for example when the claimant was an infant and had no parents or guardian[4] or the claimant was in a coma without a guardian.[5] Various inroads also were made by judicially attacking the accrual date, which is a matter of federal, not state, law. This occurred mainly in medical malpractice cases on various premises such as continuous treatment, credible explanation, undetermined damages, blameless ignorance, splitting a cause of action, fraudulent concealment and suppressed recollection.[6] The "accrual date" becomes a fact-intensive inquiry requiring thorough investigation, including questioning the claimant, the treating physician, and other personnel who cared for the claimant.[7] The courts often welcomed these arguments to avoid the harsh consequences of SOL, particularly in brain-damaged-at-birth claims.

In *Irwin v. Veterans Administration*,[8] the United States Supreme Court announced that the doctrine of equitable tolling applied to a requirement to file suit within ninety days of receiving notice of the denial of an Equal Opportunity complaint as required by 42 U.S.C. § 2000e-16(c). The Court stated that statutes of limitation in actions against the United States are subject to the same rebuttable presumption of equitable tolling applicable to suits against private individuals. This ruling was contrary to previous rulings that held that an SOL established by an act of Congress was part of a waiver of sovereign immunity. In *Schmidt v. United States*,[9] the Eighth Circuit ruled that the FTCA's six months SOL requiring filing of suit by 28 U.S.C. § 2401(b) should not be waived. On appeal, the Supreme Court vacated the judgment and remanded the case for further consideration in light of *Irwin*.[10] On remand, the Eighth Circuit stated that the FTCA's SOL for filing suit was not jurisdictional, but instead was an affirmative offense to be established by the United States. The case was remanded for trial as the district court had held that neither side had been able to establish when the denial notice was mailed. In other words, it was not incumbent on the claimant to establish a timely filing, it was the government's burden to prove an *untimely* filing.[11] Notices of FTCA claim denial must be sent by certified mail, return receipt requested.[12] The actual date of mailing by the United States Postal Service (USPS) must be the date appearing on the denial notice. Area claims offices denying claims should institute procedures to document the date that the USPS received the denial letter. Dating a denial notice and sending it to another Army office for transmission to the USPS is not adequate. Additionally, the return receipt should be placed in the file before the file is retired. This should pose no problem, because FTCA files must be held at least six months after the date of denial.

Since *Schmidt*, the circuit courts have widely acknowledged that equitable tolling applies to the FTCA. Equitable tolling

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[1] 28 U.S.C. § 2401(b) (1988).

[2] 10 U.S.C. § 2733(b)(1) (1988).

[3] Casias v. United States, 532 F.2d 1339 (10th Cir. 1976); Caton v. United States, 495 F.2d 635 (9th Cir. 1974).

[4] Mann v. United States, 399 F.2d 672 (9th Cir. 1968); *contra* Zavala v. United States, 876 F.2d 780 (9th Cir. 1978).

[5] Clifford v. United States, 738 F.2d 977 (9th Cir. 1984); Washington v. United States, 769 F.2d 1436 (9th Cir. 1985).

[6] *See* UNITED STATES ARMY CLAIMS SERVICE, FEDERAL TORT CLAIMS ACT HANDBOOK 15-16, app. F (Feb. 1984) [hereinafter FTCA HANDBOOK].

[7] DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS, para. 6-14 (15 Dec. 1989) [hereinafter DA PAM. 27-162].

[8] Irwin v. Veterans Admin., 111 S. Ct. 453 (1990).

[9] Schmidt v. United States, 901 F.2d 680 (8th Cir. 1990).

[10] Schmidt v. United States, 111 S. Ct. 944 (1991).

[11] Schmidt v. United States, 933 F.2d 639 (9th Cir. 1991).

[12] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 4-9i(1) (26 Feb. 1990) [hereinafter AR 27-20]; 28 C.F.R. 14.9.

was applied in an FTCA negligent eye-surgery case.[13] Equitable tolling was denied, however, in several other FTCA cases: a brain-damaged-at-birth case where the parents knew of the cause of injury in 1987 but did not file until 1990;[14] a contamination-of-land-use case where the claimant wrote the Corps of Engineers (COE) in 1991 stating that land was contaminated before 1988;[15] in a case where a second suit was filed after a first suit was dismissed without prejudice because of lack of due diligence;[16] and where the claimant did not rely on an Internal Revenue Service agent's misrepresentation concerning the need to file a claim.[17] Although they failed to apply equitable tolling on the facts of the given cases, these courts acknowledge that it *does* apply to the FTCA. Despite these decisions, the DOJ adheres to the position that the doctrine does not apply to the FTCA.

Courts will not disregard the FTCA's SOL on a wholesale basis based on equitable tolling. However, a recent case will have more of a direct impact on the operation of Army claims offices. The Sixth Circuit applied equitable tolling in *Glarner v. United States Department of Veteran's Affairs* [18] where a veteran hospitalized for a hip problem was involved in a series of serious mishaps that greatly increased his previously established Department of Veterans Affairs (DVA) disability. While still a patient, he told a Disabled American Veterans (DAV) officer located in the DVA hospital that he wanted to file a negligence claim. He was given a form to complete for increased benefits under 38 U.S.C. § 1151 and not a *Standard Form (SF) 95*. A DAV representative is not a United States employee, but a representative of a private organization furnished space in a DVA hospital. Although a DVA manual (*VAGC Manual M-02-1*, section 35.04) requires referral to the office of District Counsel when an adverse event occurs that causes significant injury or death,[19] this procedure was not followed. However, the court failed to discuss that the DVA representative was not a United States employee and that the DVA had a separate claims process.

What practical effect does the doctrine of equitable tolling have on the every day operation of an Army claims office? Established claims policy has been to place claimants on written notice of the defects in claims. This procedure is based on case law.[20] In *Schmidt*, the Court placed this duty on the United States. However, this policy concerns only actions after a claim has been filed. It is necessary to initiate action to inform potential claimants of their right to file much earlier. Unit investigators of accidents are required to interview all persons, including potential claimants involved with an accident. These investigators should be taught and encouraged to inform injured parties on the correct method of filing a claim,[21] regardless of whether the investigation is for a report of survey, collateral safety, or disciplinary investigation. The practice of avoiding interviews of potential claimants to possibly preclude the filing of the claim serves little purpose and is contrary to claims policies and procedures.[22] All Army and Department of Defense agencies within the geographic area of the office's responsibility should know the location of an Army claims office and claims procedures. The most common problem with the SOL arises in medical malpractice cases. Designated representatives of Army medical treatment facilities (MTF) are required to inform a patient of an adverse event.[23] A claims judge advocate (CJA) must be informed of adverse occurrences in an MTF. The medical officer involved should be instructed to inform the CJA if the patient requests a remedy or redress for the injury or death. The CJA or attorney should be present at the briefing to the patient regarding patient options. These medical briefings should be noted in a written record (*e.g.*, the patient's record).[24]

In a number of past claims, the USARCS has been confronted with allegations that soldiers have been informed that claims cannot be filed because of the incident to service or *Feres* doctrine.[25] Informing claimants and their representatives of the *Feres* doctrine, particularly before the expenditure to obtain large quantities of records, is good practice, however, soldiers should be given *SFs 95* and told how to file

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[13] Diltz v. United States, 771 F. Supp. 94 (D. Del. 1991).

[14] McKewin v. United States, Civ. No. V 91-131-CIV-5-7 (E.D. N.C. 1992).

[15] Muth v. United States, 804 F. Supp. 838 (S.D. W. Va. 1992).

[16] Justice v. United States, 6 F.3d 1474 (11th Cir. 1993).

[17] First Alabama Bank v. United States, 961 F.2d 1226 (11th Cir. 1993).

[18] 30 F.3d 697 (6th Cir. 1994).

[19] Further DVA procedures relative to filing are found at 38 C.F.R. 14.604.

[20] FTCA HANDBOOK, *supra* note 6, at 8; AR 27-20, *supra* note 12, para. 1-9a(2).

[21] AR 27-20, *supra* note 12, para. 2-3.

[22] DA PAM. 27-162, *supra* note 7, para. 5-15.

[23] DEP'T OF ARMY, REG. 40-68, MEDICAL SERVICES: QUALITY ASSURANCE ADMINISTRATION, para. 3-5b(2) (20 Dec. 1989).

[24] DA PAM. 27-162, *supra* note 7, para. 6-8.

[25] Feres v. United States, 340 U.S. 135 (1950).

claims. Potential claim files should be initiated and written records should be made of these transactions. Such allegations are not limited to cases in which soldiers are the injured party, but extend to cases in which the soldiers' children or spouses are the injured party. In these cases, the *Feres* doctrine does not bar the claims. For example, if a child is injured during delivery, the child, the mother, and father may claim despite the doctrine. The only limitation is that the military spouse may only file a derivative claim.[26] This transaction also should be recorded. Legal assistance offices also are the target of such allegations and should be alerted to the problem.

Another area of concern is the failure to inform a claimant of the right to file a tort claim before denial of a personnel claim. This is a widely disregarded regulatory requirement.[27] It usually applies when the personnel claim is being disapproved on the grounds that there was no unusual occurrence and the claimant is alleging negligence on the part of the United States. Failure to so advise a claimant when there is a regulatory requirement to do so, falls within the circumstances justifying the application of equitable tolling.

Does the doctrine of equitable tolling apply to the MCA? Because the USARCS's policy has been to interpret the MCA in light of FTCA decisions, there is no reason not to apply the doctrine. Because the National Guard Claims Act[28] is a carbon copy of the MCA, the doctrine applies equally. The Army Maritime Claims Settlement Act presents a different problem. Because of the difficulty in determining whether a claim falls under the FTCA or the maritime jurisdiction, claims offices are required, on filing of this claim, to inform the claimant, in writing, of the need to file a maritime suit not later than two years from accrual, if the claimant considers the claim to be a maritime claim.[29] This is true regardless of the status of negotiations in the administrative claim.[30]

The onset of the applicability of equitable tolling to tort claims should not be viewed as a surprising development, but as an effort by the courts to avoid the effects of a rigorous SOL. In most jurisdictions, under state law, a child can bring suit until the age of majority. Moreover, the courts view administrative filing requirements as obstacles to the realization of justice to injured parties. The best way to counter this trend is to use aggressive measures to inform injured persons of their rights—to be forthright and fair. Accordingly, CJAs must be informed in both law and procedures. If an issue arises in which even the least uncertainty exists, the CJA should discuss the matter with the area action officer at the USARCS. Mr. Rouse, Tort Claims Division.

Policy Note

Payment of Repair Estimate Fees

This Claims Policy Note clarifies guidance found in *Army Regulation (AR) 27-20*,[31] paragraph 11-14a, and *Department of the Army Pamphlet 27-162*,[32] paragraph 2-18. In accordance with *AR 27-20*, paragraph 1-9f, this guidance is binding on all Army claims personnel.

Army Regulation 27-20 provides that the fee for estimates of repair or replacement "necessary to substantiate amounts claimed for damaged [or destroyed] property may be considered, provided the action of the claimant in contracting for the estimates appears reasonable under the circumstances or was specifically directed by the approval or settlement authority."[33] Therefore, as a routine matter, field claims offices pay for these costs. However, field claims offices have not paid for these costs when it has been determined that the item was not damaged or destroyed incident to service (*e.g.*, not caused in shipment of household goods).

Starting on 1 January 1995, field claims offices may pay for the fees for estimates of repair or replacement even if the items of personal property in question ultimately are not compensable. Field claims offices send claimants to obtain estimates to substantiate the claimed loss or damage, and claimants, for the most part, do not know if the damage or loss was caused incident to service or not. A classic example is the claimant who declares that her stereo receiver does not work. The claimant does not know why the component is not working, and there is no external damage. The claimant then obtains an estimate of repair and the repairman states that the damage is not shipment related. The claimant should not bear the loss of the fee paid to the estimator.

Payment of the estimate fee will be determined based on the facts of each claim. If a field claims office determines that the claimant knew that the damage claimed was not caused

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[26] *See* Irwin v. United States, 845 F.2d 126 (6th Cir. 1988); Atkinson v. United States, 825 F.2d 202 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1288 (1988).

[27] AR 27-20, *supra* note 12, para. 2-11d(1).

[28] 32 U.S.C. 715 (1988).

[29] AR 27-20, *supra* note 12, para. 2-11b(5).

[30] Raziano v. United States, 999 F.2d 1539 (11th Cir. 1993).

[31] *See* AR 27-20, *supra* note 12.

[32] *See* DA PAM. 27-162, *supra* note 7.

[33] AR 27-20, *supra* note 12, para. 11-14.

incident to service, (*e.g.*, evidence indicates that the claimant knew that the claimed damage to an item existed prior to shipment of the household goods) or the item is of the kind that compensation is never awarded (*e.g.*, radar detectors) then it may not be appropriate to pay the estimate cost.

Field claims offices will apply this guidance to all personnel claims filed on 1 January 1995, and thereafter. Lieutenant Colonel Kennerly.

Personnel Claims Note

Forwarding Personnel Claims Files to the USARCS

On 13 December 1993, the USARCS sent a message to all claims offices providing guidance on when to mail personnel claims files to USARCS. This message was generated because the USARCS had received numerous files that could not be worked because automated claims data had not been received at the USARCS from field claims offices prior to the actual claims.

Field claims offices responded quickly to this guidance and the backlog of unworkable claims began to disappear. To reinforce this message, the guidance contained therein is reprinted here. Continuing to comply with these forwarding requirements is important.

1. Claims offices are routinely required to forward claims files to the USARCS for retirement and/or centralized recovery. The design of the automated claims system will allow only data to be uploaded if the disk containing the data reaches the USARCS before the claim file. Once the USARCS receives the file and enters a mail room date, information from the field office is "locked out," prohibiting data entry from the field once the USARCS has the claim file.

2. The USARCS uses the information contained in the database to provide statistics to a number of agencies, including the GAO and the MTMC. There are plans to use this data as part of the program used to score carriers and eventually improve the quality of service to soldiers. Therefore, ensuring timely and accurate data input into the USARCS system is critical. For example, an incorrect SCAC code entry may cause the USARCS to provide misinformation about a carrier, or to offset the wrong carrier. Failure to properly record recovery deposits on the automated program may distort carrier recovery performance analysis.

3. Field claims offices will continue following the guidance printed below:

a. After the close of the month, transmit data to the USARCS or your command claims service by close of business of the first workday of each month. This will allow the USARCS to receive and upload the data earlier each month.

b. Closed files. Enter the "FF" code the day after you settle the claim or complete local recovery action. Then hold the file forty-five days before you forward it to the USARCS for retirement (*e.g.*, "PF" code is entered on 15 December 1994; "FF" code is entered on 16 December 1994; file is actually mailed on 30 January 1995). If you enter the "FF" code on the same day that you settle the claim, the two options may be reversed during upload into the USARCS database. The database cannot distinguish multiple entries on the same date.

c. Files forwarded for centralized recovery. Enter the "FR" or "FE" codes the day after you settle the claim. Then hold the file for thirty days before you forward it to USARCS for recovery, (*e.g.*, "PF" code is entered on 15 December 1994; "FR" code is entered on 16 December 1994; file is actually mailed on 16 January 1995).

d. Files forwarded to the MSC for privately owned vehicle (POV) recovery. There is no need to hold these files after entering the "TV" code. These claims are not received at the USARCS until after recovery is completed by the MSC (typically, three to six months). Therefore, they do not cause the problems mentioned above. The POV files that involve the new single contractor POV pilot program should be treated like files held for retirement (see paragraph 3b, above).

e. Return of files from the USARCS. The only reason that a file should be returned to a field claims office is for reconsideration action. Please inform claimants that, although they have up to one year to request reconsideration, it is necessary to inform your office as early as possible that they intend to do so, so that the file can be retained. Do not forward those files on which you know you will receive a request for reconsideration until you have received and acted on the reconsideration. However, do not unnecessarily retain files unless it is clear that a claimant wishes reconsideration. Too many files being held will clog the field claims office and delay carrier recovery.

f. Files forwarded for reconsideration. Holding these files after you enter the "TA"

code is not necessary. However, it is necessary to enclose a copy of the transfer diskette in every file forwarded for payment or reconsideration action ("TA"). This enables the file to be uploaded immediately into the system and reduces the possibility that duplicate files or errors will be entered into the USARCS's database. Sending disks with files forwarded for recovery ("FR") or retirement ("FF") is not necessary.

4. Each month, after the data is uploaded into the main database, the USARCS sends a report to each office. This report either states "There were no errors" or it lists the errors by claim number and specifies the error field. "Errors" are records that contain incorrect or inconsistent data, so that they could not be uploaded into the system. If the report your office receives contains errors, removing those claims files from your suspense, making the corrections in your database, and forwarding the corrected disks to the USARCS is vital. Make new paper screens for the claims files, and hold those files an additional thirty days before you retire them. This will allow the corrected data to be uploaded before the claim file is received at the USARCS. Lieutenant Colonel Kennerly.

Professional Responsibility Notes

DA Standards of Conduct Office

Ethical Awareness

Informal Opinion No. DAJA-SC 94/0689 (30 Nov. 1994)

(Army Reserve judge advocate could represent former client in new matters subject to regular rules)

Army Rule 1.5(h)
(Fees)

Army Regulation 27-1
(Judge Advocate Legal Service: Fees and Referrals)

Army Regulation 27-3
(Legal Assistance: Fees and Referrals)

Army lawyers, including reservists, may not personally benefit from same cases in which they first became involved in legal assistance capacity.

Army Rule 1.11
(Successive Government and Private Employment)

Army lawyers may not represent private clients in connection with same matters in which the lawyers participated personally and substantially as public officers or employees.

18 U.S.C §§ 202-208
(Revolving Door Prohibitions)

Army Rule 1.11
(Successive Government and Private Employment)

Government's and legal profession's policies should not unreasonably interfere with the ability of former active or Reserve Army lawyers to earn a livelihood, nor hinder recruiting efforts to attract new lawyers.

Former government defense counsel do not "switch sides" by continuing, as private attorneys, to represent same clients, because the clients' interests are adverse to the government.

Joint Ethics Regulation (JER) *Chapter 2G*
(Misuse of Position)

Army Regulation 27-3
(Legal Assistance: Fees and Referrals)

PRC Opinion 81-1
(Misuse of Position)

Army lawyers are prohibited from soliciting junior Department of Defense (DOD) personnel from representing for a fee their former clients in any general matter arising from a legal assistance relationship, and from otherwise using their official positions to gain clients for their private practices.

Army Rule 9.1
(Interpretation)

Army lawyers are encouraged to seek interpretations of Army rules from their legal supervisory chain; to request a formal opinion from the Department of the Army (DA) Professional Responsibility Council,

lawyers must submit a complete description of the factual situation, a discussion of the relevant law, and the lawyer's opinion as to the correct interpretation through their legal supervisory chain.

Colonel Esquire, an Army Reserve judge advocate, telephoned the DA Standards of Conduct Office (SOCO) wanting to represent a former officer elimination client, Mr. *A*, for a fee in his private capacity. He then wrote and requested an opinion, stating that he wanted to assist in upgrading or setting aside Mr. *A*'s other than honorable (OTH) discharge. Mr. *A*'s OTH discharge from the Army Reserve was based on a civil conviction which had been set aside with the assistance of other private counsel. Mr. *A* would be seeking relief from the Army Board for Correction of Military Records (ABCMR).

Colonel Esquire's representation as a United States Army Reserve judge advocate in an administrative discharge proceeding was in 1983, and Mr. *A* did not seek his representation as a private attorney until 1993. Colonel Esquire's letter and Mr. *A*'s statement related that between the two of them there was no solicitation, no other representation over ten years, and virtually no contact until 1993. Mr. *A* wrote, "I have dealt with many lawyers in my life, but Colonel Esquire's extraordinary legal efforts on my behalf a decade ago still impress me."[1]

Four distinct sets of standards govern Colonel Esquire's proposed representation of Mr. *A*:

a. Federal criminal statutes.[2]

b. Standards of conduct for federal employees.[3]

c. Professional responsibility under the Army Rules and state bar rules.

d. Obtaining new business through one's official position as restricted by three specific Army regulations.[4]

Federal Criminal Statutes—18 U.S.C.

This proposed representation raises issues under the federal conflict of interest or "revolving door" statutes found at 18 U.S.C. §§ 202 to 208.[5] Under 18 U.S.C § 202(a), a Reserve officer of the armed forces (or officer of the National Guard of the United States) is classified as a special government employee while on active duty (AD) solely for training or while serving involuntarily.[6] Federal policy is not to unduly restrict Reservists' civilian employment opportunities:

> A special Government employee is in general subject only to the following major prohibitions:
>
> 1. (a) He may not, except in the discharge of his official duties, represent anyone else

[1] Colonel Esquire failed to state whether he served as a Reserve officer for no more than 60 days during the past 365 consecutive days, although the SOCO assumed that as an IMA officer, he did not. Exceeding 60 days changes a Reservist's status under 18 U.S.C. § 202(a) from "special Government employee" to "officer of the United States." *See infra* note 6 and accompanying text.

Nor did Colonel Esquire state whether he first saw Mr. *A* to advise about his civilian criminal matter (a legal assistance matter) or to represent him in the discharge board (a defense function). The Army's legal assistance regulation regulates follow-on representation of legal assistance clients. *See infra* note 28 and accompanying text.

[2] 18 U.S.C. §§ 202-208 (1988).

[3] DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993) (authorized by DEP'T OF DEFENSE DIRECTIVE 5500.7 (30 Aug. 1993)) [hereinafter JER].

[4] DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE (15 Sept. 1989) [hereinafter AR 27-1]; DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (30 Sept. 1993) [hereinafter AR 27-3]; DEP'T OF ARMY, REG. 210-7, INSTALLATIONS: COMMERCIAL SOLICITATION ON ARMY INSTALLATIONS (22 Apr. 1986) [hereinafter AR 210-7].

[5] *See generally* 18 U.S.C. §§ 202-208 (1988).

[6] A Reserve officer whose duty status is inactive-duty training should be classified as a special government employee, rather than the more restrictive "officer" category. Serving more than 60 days in the past 365 days removes a Reservist from the special government employee category of 18 U.S.C. § 202(a). Reservists who annually perform 48 drills and 14 days of active duty should not have the 48 drills counted as "days." Any other interpretation would mean that no Reservist who attended drills as ordered could be called a special government employee—a consequence unintended by Congress. *See generally* 5 U.S.C. § 2105(d) (Reservists not on active duty or who are on active duty for training are not deemed employees under Title 5, which title regulates conduct of government employees); 10 U.S.C. § 973 (Duties: officers on active duty; performance of civil functions restricted).

Section 973 provides:

> (a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.
>
> ....
>
> (b)(1) This subsection applies—
>
> ....
>
> (C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days.

before a court or Government agency in a matter in which the United States is a party or has an interest and in which he has at any time participated personally and substantially for the Government (18 U.S.C. §§ 203 and 205).

(b) He may not, except in the discharge of his official duties, represent anyone else in a matter pending before the agency he serves unless he has served there no more than 60 days during the past 365 (18 U.S.C. §§ 203 and 205). He is bound by this restraint despite the fact that the matter is not one in which he has ever participated personally and substantially.

The restrictions described in subparagraphs (a) and (b) apply to both paid and unpaid representation of another. . . .

2. He may not participate in his governmental capacity in any matter in which he, his spouse, minor child, outside business associate or person with whom he is negotiating for employment has a financial interest (18 U.S.C. § 208).

3. He may not, after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and in which he participated personally and substantially for the Government (18 U.S.C. § 207(a)).

. . . .

It will be seen that paragraphs 2, 3 and 4 for special Government employees are the same as the corresponding paragraphs for regular employees. . . .

. . . .

Subsection [202](c) narrows the application of subsection (a) in the case of a person serving as a special Government employee to two, and only two, situations. First, subsection (c) bars him from rendering services before the Government on behalf of others, for compensation, in relation to a matter involving a specific party or parties in which he has participated personally and substantially in the course of his Government duties. And second, it bars him from such activities in relation to a matter involving a specific party or parties, even though he has not participated in the matter personally and substantially, if it is pending in his department or agency and he has served therein more than 60 days in the immediately preceding period of a year.

Section 205 provides for the same limited application to a special Government employee as section 203. In short, it precludes him from acting as agent or attorney only (1) in a matter involving a specific party or parties in which he has participated personally and substantially in his governmental capacity, and (2) in a matter involving a specific party or parties which is before his department or agency, if he has served therein more than 60 days in the year past.[7]

. . . .

New 18 U.S.C. § 207. Subsections (a) and (b) of this section contain postemployment prohibitions applicable to persons who have ended service as officers or employees of the executive branch, the independent agencies or the District of Columbia. The prohibitions for persons who have served as special Government employees are the same as for persons who have performed regular duties.[8]

18 U.S.C. § 207

Under 18 U.S.C. § 207, a former officer is prohibited from "switching sides" by becoming a representative in the same particular matter in which he had personal and substantial responsibility as a former officer. Former executive branch employees are permanently restricted on termination of their employment with the United States from attempting to influence, communicate with, or appear before any employee or officer of any United States department, agency, or court on behalf of any other person (except the United States) in connection with a particular matter in which the United States had a direct and substantial interest, and in which the person participated personally and substantially.[9]

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[7] *See generally* Carolyn Elefant, *When Helping Others Is a Crime: Section 205's Restriction on Pro Bono Representation by Federal Attorneys*, 3 GEO. J. LEGAL ETHICS 719 (1990) (exploring § 205's legislative origin in 1885; arguing that providing an exception to § 205's ban on outside activities to allow federal attorneys to perform pro bono work, to the extent that no actual conflict of interest is created, would not frustrate underlying policies).

[8] 28 C.F.R. pt. 45, app. (1994).

[9] 18 U.S.C. § 207(a)(1) (1988).

Particular Matter

"[T]he term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding."[10]

An ABCMR Petition Is Not the Same Particular Matter as the Underlying Administrative Board

Colonel Esquire's representation before the ABCMR would not be prohibited because such representation would not be the same particular matter in which he was involved as a Reserve officer providing defense services. The ABCMR's jurisdiction is collateral to both courts-martial and administrative boards. The ABCMR remedies often are considered equitable in nature and new facts may be adduced, such as Mr. *A*'s good conduct and citizenship during the time following the original board. Consequently, his representation before the ABCMR would not be the same particular matter in which he took action as a defense counsel. Consideration of the ABCMR petition as a "new matter" is important to the rest of the discussion. It is one thread that repeats itself throughout the four separate regulatory patterns.

Title 18 Has Not Been Applied to Defense Counsel

Title 18 U.S.C. has not been applied to government defense counsel performing their assigned duties. Former active duty military defense counsel may participate as retained civilian counsel on appeal without violating 18 U.S.C. § 207.[11] In 1970, TJAG's Military Affairs Division provided an opinion in a conflict of interest situation involving a Reserve judge advocate officer. The officer had been released from active duty at the end of his obligated tour after serving as a defense counsel. The Military Affairs Division determined that § 207 did not apply because a defense counsel does not participate "personally and substantially as an officer, or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed." The full opinion observed that a defense counsel has no power or authority in connection with the enumerated activities. Instead, a defense counsel represents a party whose interests are *adverse* to the government. Defense counsel has no access to inside information and would not be "switching sides."[12]

18 U.S.C. § 208

Although Colonel Esquire would have a financial interest in Mr. *A*'s case, he would not be participating in the ABCMR case as a government officer. Therefore, 18 U.S.C. § 208 would not prevent his representation of Mr. *A* as a private attorney.

Traditionally, only the Attorney General of the United States may make a definitive interpretation of a criminal statute.[13] Because the proposed ABCMR representation involved the interpretation of federal criminal statutes, Colonel Esquire was advised to seek her opinion.

Standards of Conduct

In the second area, Colonel Esquire's letter was treated as a request for an advisory opinion by an agency ethics official with respect to standards of conduct issues.[14] Professional Responsibility Committee (PRC) Opinion 81-1 held that a Reserve judge advocate officer may not use his or her legal assistance duties to gain private practice clients.[15] The *JER* generally prohibits using public office for private gain, using

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[10] *Id.* § 207(i)(3).

[11] Military Affairs Div., Off. JAG, Army, JAGA/4815 (5 Nov. 1970), *as digested in* 71-6, Judge Advocate Legal Service 9 (25 Mar. 1971).

[12] *Id. See also* United States v. Andrews, 21 C.M.A 165, 44 C.M.R. 219 (1972) (Judge Advocate General Corps officer released from active duty may continue to act for an accused immediately after his release); Coles, Manter & Watson v. Denver Dist. Ct., 493 P.2d 374, 375 (Colo. 1972) (former public defenders who established private law firm had no ethical conflicts of interest precluding representation in private capacities of same defendants in same cases because employment "in the public defender's office" was not the type of public employment contemplated by EC 9-3 and DR 9-101(B), MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-3, DR 9-101(B) (avoiding even the appearance of professional impropriety)).

[13] *See generally* 28 U.S.C. §§ 511-513 (1988) (Attorney General to advise the President, heads of executive departments, and Secretaries of military departments). *But cf.* 43 Op. Atty. Gen. 66 (1980). The opinion's footnote states:

> Attorneys General have opined that they do not have the authority to issue opinions when it is apparent that the request has been made, not because the requestor has any real concern about his authority, but because private persons, who engage in transactions with the United States, have insisted upon such an opinion for their benefit. . . . I ask you to inform private persons who transact business with [the Treasury] that the Attorney General will not issue opinions solely because they feel it is important to protect them or guide them in their transactions, and that opinions related to business transactions with the government will be issued only when the transaction raises a substantial and genuine issue of law arising in the administration of a department.

Id. n.* (citations omitted).

The Ethics Reform Act of 1989 gave the Office of Government Ethics (OGE) authority to issue regulations interpreting 18 U.S.C. § 208. This authority to interpret § 208 has been delegated to agency Ethics Counselors. *See* JER, *supra* note 3, § 2635.401-.403, ch. 2 (reprinting 5 C.F.R. § 2635.401-.403); *id.* para. 8-501. Also, the OGE expects to publish proposed regulations interpreting 18 U.S.C § 207 within two years.

[14] JER, *supra* note 3, § 2635.107, ch. 2 (reprinting 5 C.F.R. § 2635.107); *id.* § 206(a)(2).

[15] Professional Responsibility Committee Opinion 81-1 *reported in* ARMY LAW., Sept. 1982, at 17 [hereinafter PRC Opinion 81-1]. The committee commented (at footnote 1) that even if the attorney had seen the clients at the legal assistance office as "private clients," *Army Regulation 600-50, Standards of Conduct,* would have been violated because government facilities cannot be used for a private purpose. DEP'T OF ARMY, REG. 600-50, PERSONNEL—GENERAL: STANDARDS OF CONDUCT FOR DEPARTMENT OF THE ARMY PERSONNEL (28 Jan. 1988), (superceded by the JER, *supra* note 3, which now controls standards of conduct).

government property for unauthorized purposes, and using official time for unofficial objectives.[16] Chapter 5 of the *JER* prohibits soliciting DOD personnel who are junior in rank.[17] However, Colonel Esquire's proposed representation would be proper because there was neither misuse of position nor solicitation.

Professional Conduct Issues

Regarding ethics issues arising under *Army Regulation 27-26*, the SOCO's response served as an informal, advisory ethics opinion.[18] Under Army Rule 1.5(h) (Fees), a lawyer cannot accept a paying self-referral for the same general matter, *but may take a new matter* unless his or her official position was used to solicit or obtain a client. Army Rule 1.11 (Successive Government and Private Employment) generally prohibits a lawyer from representing a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the government agency agrees to such representation. Army Rule 1.11 is the counterpart of Rule 1.9(b), that applies to lawyers moving from one firm to another, but Rule 1.11 is more liberal. Rule 1.11's rationale parallels that of 18 U.S.C. § 207(a)(3) (*i.e.*, unless participating "in the same particular matter," a lawyer is not disqualified). The comments indicate that the rule exists to prevent the power and discretion vested in public authority from being used for the benefit of a private client. American Bar Association Formal Opinion 342, interpreting DR 9-101[19] (avoiding even the appearance of professional impropriety), the broadly sweeping predecessor to Army Rule 1.11, is in accord. There the committee emphasized the importance of not hindering agency recruiting with unnecessary future practice limitations.[20]

Neither Army Rule 1.5(h) nor 1.11 were bars. First, Colonel Esquire had not participated as a "public officer or employee" by providing defense services. Second, the ABCMR representation would not be the same "matter" as the original board representation.

Obtaining New Business—Army Regulations

An active duty, Reserve, or civilian attorney may not benefit from a legal assistance referral. Three Army regulations—*Army Regulation 210-7*, *Army Regulation 27-1*, and *Army Regulation 27-3*—provide guidance. *Army Regulation 210-7*,[21] which regulates commercial solicitation, did not apply at all to Colonel Esquire because he never solicited Mr. *A*.

Under *Army Regulation 27-1*, an attorney is not permitted to make referrals to himself or herself (while off duty), or to an associate unless the services are to be provided free.[22] *Army Regulation 27-3* prohibits attorneys from referring clients with whom they have "communicated substantively on a legal assistance matter" to themselves "for the same general matter for which the client sought legal assistance, except on a no-fee basis."[23] New matters such as the proposed ABCMR appeal are, therefore, not prohibited. Lieutenant Colonel Neveu and Mr. Eveland.

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[16] JER, *supra* note 3, ch. 2 (reprinting 5 C.F.R. §§ 2635.702-5).

[17] JER, *supra* note 3, § 5-409.

[18] DEP'T OF ARMY REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]. An attorney desiring a formal ethics opinion must invoke the procedures of Army Rule 9.1, *Army Regulation 27-26*, which establishes a procedure to research and present a proposed solution through one's technical chain of command to the Department of the Army Professional Conduct Council. Army Rule 9.1(c) states:

> Army lawyers are encouraged to seek interpretations of these rules from their legal supervisory chain. Any lawyer subject to these Rules may request an opinion from the Council. To do so, *the lawyer must submit a complete description of the factual situation* that is the subject of contention under the Rules, subject to Rule 1.6 and Rule 8.5(f), *a discussion of the relevant law, and the lawyer's opinion as to the correct interpretation*. For Army lawyers, the request must be submitted through their legal supervisory chain and the professional responsibility committee established by the lawyer's senior counsel.

(emphasis added).

Reserve members of the Judge Advocate Legal Service (JALS), when acting in their official capacities, are guided by *Army Regulation 27-26*. At the time of the elimination board, in 1983, the American Bar Association Code of Professional Responsibility was followed, which would not affect the result.

Because Colonel Esquire wished to represent Mr. *A* in his capacity as a private attorney and not as a Reserve officer, his state ethics rules also would apply, about which the SOCO tendered no opinion.

[19] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101 (1980).

[20] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).

[21] *See supra* note 4.

[22] AR 27-1, *supra* note 4, para. 4-3b. *Army Regulation 27-1* paragraph 4-3c states:

> A lawyer (including Reserve Component members) who has initially represented a client concerning a matter as part of the attorney's official Army duties shall not accept any salary or other payments as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity.

This self-referral restriction has been abandoned in the revised *Army Regulation 27-1* (approved and awaiting publication) to not duplicate provisions of the *JER* and the 1993 legal assistance regulation; *see id.* para. 4-7 (Ethical Standards).

[23] *Id.*, para. 4-7*d*(2). Assistance on a civilian criminal matter is considered a legal assistance function. Officer elimination actions are considered matters for the Trial Defense Service (TDS), which has no separate regulation. Although Colonel Esquire's letter did not specify whether he first saw Mr. *A* to advise about his civilian criminal matter or to represent him in the discharge board, the result was the same.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

NCESGR-Provided Training Materials

The National Committee for Employer Support of the Guard and Reserve (NCESGR), an agency of the Department of Defense (DOD), has prepared two documents regarding the new veterans' reemployment law, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). One document is a seven-page summary of the USERRA, which was prepared for use in training NCESGR Ombudsmen. The second document is a fact sheet in a question and answer format prepared for commanders and judge advocates. Both of these documents are available through the Legal Assistance Conference and the Reserve Conference on the Legal Automated Army-Wide System Bulletin Board System (LAAWS BBS).

The USERRA requires the Secretaries of Defense, Labor, and Veterans' Affairs to take such actions as necessary to inform persons entitled to rights and benefits under USERRA about the new law.[1] As a part of this "outreach" requirement, the NCESGR is developing training materials for reserve component and active component judge advocates to use in conducting professional development classes regarding the USERRA for service members. These materials will include a comprehensive one-hour briefing and a fact sheet for service members. As soon as these training materials are completed they will be available on the Legal Assistance Conference and the Reserve Conference of the LAAWS BBS.

These USERRA training materials may be used in conjunction with briefings provided by your local representative from the Department of Labor's Veterans' Employment and Training Service (VETS). To contact the nearest VETS representative, call the Department of Labor (DOL) at 1-800-442-2838 and ask for the name and telephone number of your local VETS representative.

Individual questions from service members and employers may be referred to NCESGR at 1-800-336-4590. Under USERRA the DOL continues to have the lead on enforcement of veterans' reemployment rights and benefits. Refer any issues that may arise regarding possible violations of the law to a DOL VETS representative. Colonel Patricia H. Laverdure, United States Marine Corps Reserve.

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

Following is an updated schedule of The Judge Advocate General's CLE On-Sites. If you have any questions concerning the On-Site schedule please direct them to the local action officer or CPT Eric G. Storey, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

[1] 38 U.S.C. § 4333 (1988).

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
6-8 Jan 95	Long Beach, CA 78th LSO Hyatt Regency Long Beach, CA 90815	AC GO RC GO Int'l-Ops Law Ad & Civ GRA Rep	MG Nardotti BG Cullen MAJ Martins MAJ Hossbach LTC Menk	MAJ John C. Tobin Best, Best & Krieger P.O. Box 1028 Riverside, CA 92502 (714) 229-3700
21-22 Jan 95	Seattle, WA 6th LSO Univ. of Washington Law School Seattle, WA 78205	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	MG Gray BG Sagsveen MAJ Johnson MAJ Pendolino Dr. Foley	LTC Matthew L. Vadnal 6th LSO Bldg. 572 Seattle, WA 98199 (206) 281-3002
18-19 Feb 95	Chicago, Il 214th LSO Holiday Inn (Holidome) 3405 Algonquin Road Rolling Meadows, IL 60008	AC GO RC GO Int'l-Ops Law Contract Law GRA Rep	MG Nardotti BG Lassart LTC Crane LTC Krump LTC Menk	MAJ Ronald C. Riley 18525 Poplar Ave. Homewood, IL 60430 (312) 443-4550

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP	ACTION OFFICER
25-26 Feb 95	Salt Lake City, UT	AC GO	BG Magers — LTC Edward O. Ogilvie
	87th LSO	RC GO	BG Sagsveen — 1584 East Parkridge Dr.
split training	Olympus Hotel	Crim Law	MAJ Barto — Salt Lake City, UT 84121
w/Denver	6000 Third Street	Ad & Civ	LTC Pearson — (801) 575-1650
	Salt Lake City, UT 84114	GRA Rep	LTC Hamilton
25-26 Feb 95	Denver, CO	AC GO	LTC Karl E. Hansen
	87th LSO	RC GO	BG Lassart — P.O. Box 6124
	Fitzsimmons AMC, Bldg.820	Crim Law	MAJ Barto — Aurora, CO 80045-6124
	Aurora, CO 80045-7050	Ad & Civ	MAJ Pearson — (303) 361-1208
		GRA Rep	COL Reyna
4-5 Mar 95	Columbia, SC	AC GO	MG Gray — MAJ Paul Conrad
	120th ARCOM	RC GO	BG Sagsveen — 120th ARCOM
	Univ of SC Law School	Crim Law	MAJ Winn — Bldg. 9810, Lee Rd.
	Columbia, SC 29208	Ad & Civ	MAJ Hernicz — Fort Jackson, SC 29207
		GRA Rep	LTC Menk/CPT Storey — (803) 751-6152
10-12 Mar 95	Dallas/Fort Worth	AC GO	BG Huffman — COL Richard Tanner
	1st LSO	RC GO	BG Sagsveen — 401 Ridgehaven
	Stouffer-Dallas	Int'l-Ops Law	LCDR Winthrop — Richardson, TX 75080
	2222 Stemmons Freeway	Crim Law	MAJ Burrell — (214) 991-2124
	Dallas, TX 75207	GRA Rep	LTC Hamilton
11-12 Mar 95	Washington, DC	AC GO	MG Gray — CPT Robert J. Moore
	10th LSO	RC GO	BG Cullen — 10th LSO
	NWC (Arnold Auditorium)	Int'l-Ops Law	MAJ Whitaker — 5550 Dower House Road
	Fort Lesley J. McNair	Contract Law	MAJ Ellcessor — Washington, DC 20315
	Washington, DC 20319	GRA Rep	LTC Menk/CPT Storey — (301) 763-3211/2475
18-19 Mar 95	San Francisco, CA	AC GO	MG Nardotti — LTC Joe Piasta
	5th LSO	RC GO	BG Sagsveen, BG — 717 College Avenue
	Sixth Army Conference Room		Lassart, BG Cullen — Second Floor
	Presidio of SF, CA 94129	Ad & Civ	MAJ Peterson — Santa Rosa, CA 95404
		Crim Law	LTC Bond — (707) 544-5858
		GRA Rep	COL Reyna
1-2 Apr 95	Indianapolis, IN	AC GO	BG Magers — COL George A. Hopkins
	National Guard	RC GO	BG Cullen — 2002 South Holt Road
		Ad & Civ	MAJ Diner — Indianapolis, IN 46241
		Crim Law	MAJ Kohlman — (317) 457-4349
		GRA Rep	LTC Hamilton
7-9 Apr 95	Orlando, FL	AC GO	MG Nardotti — MAJ John J. Copelan, Jr.
	174th LSO	RC GO	BG Lassart — Broward County Attorney
	Airport Marriott	Contract Law	MAJ DeMoss — 115 South Andrews Avenue
	7499 Augusta National Dr.	Int'l-Ops Law	LTC Winters — Suite 423
	Orlando, FL 32822	GRA Rep	Dr. Foley — Fort Lauderdale, Fl 33301
			(305) 357-7600

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
29-30 Apr 95	Columbus, OH 83d ARCOM/9th LSO/ OH ARNG Best Western-Columbus North 888 East Dublin-Granville Rd. Columbus, OH 43229	AC GO RC GO Ad & Civ Crim Law	BG Cuthbert BG Lassart MAJ J. Frisk MAJ Wright	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH
5-7 May 95	Huntsville, AL 121st ARCOM Corps of Engineer Ctr. Huntsville, AL 35805	AC GO RC GO Contract Law Crim Law GRA Rep	MG Nardotti BG Cullen MAJ Hughes MAJ A. Frisk COL Reyna	LTC Bernard B. Downs, Jr. HHC, 3d Trans Bde 3415 McClellan Blvd. Anniston, AL 36201 (205) 939-0033
12-13 May 95	Gulf Shores, AL AL ARNG	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	BG Cullen MAJ Hughes MAJ Martins Dr. Foley	COL Larry Craven Office of the Adj General ATTN: AL-JA P.O. Box 3711 Montgomery, AL 36109 (205) 271-7471
12-14 May 95	Kansas City, MO 89th ARCOM 3130 George Washington Blvd. Wichita, KS 67120	AC GO RC GO Contract Law Ad & Civ GRA Rep	BG Magers BG Lassart MAJ Causey MAJ Jennings LTC Menk	LTC Keith H. Hamack HQ, Fifth U. S. Army Attn: AFKB-JA Fort Sam Houston San Antonio, TX 78234 (210) 221-2208 DSN 471-2208

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those who have been allocated student quotas. Quotas for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. The ATRRS school code for TJAGSA is 181. **If you do not have a confirmed quota in ATRRS, you do not have a quota for a TJAGSA CLE course.** Active duty service members must obtain quotas through their directorates of training or through equivalent agencies. Reservists must obtain quotas through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their unit training offices. To verify a quota, ask your training office to provide you with a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1995

6-10 February: 128th Senior Officers' Legal Orientation Course (5F-F1).

6-10 February: PACOM Tax CLE (5F-F28P).

6 February-14 April: 136th Basic Course (5-27-C20).

13-17 February: 59th Law of War Workshop (5F-F42).

13-17 February: USAREUR Contract Law CLE (5F-F15E).

27 February-3 March: 36th Legal Assistance Course (5F-F23).

6-17 March: 134th Contract Attorneys' Course (5F-F10).

20-24 March: 19th Administrative Law for Military Installations Course (5F-F24).

27-31 March: 1st Procurement Fraud Course (5F-F101).

3-7 April: 129th Senior Officers' Legal Orientation Course (5F-F1).

17-20 April: 1995 Reserve Component Judge Advocate Workshop (5F-F56).

17-28 April: 3d Criminal Law Advocacy Course (5F-F34).

24-28 April: 21st Operational Law Seminar (5F-F47).

1-5 May: 6th Law for Legal NCOs' Course (512-71D/E/20/30).

1-5 May: 6th Installation Contracting Course (5F-F18).

15-19 May: 41st Fiscal Law Course (5F-F12).

15 May-2 June: 38th Military Judge Course (5F-F33).

22-26 May: 42d Fiscal Law Course (5F-F12).

22-26 May: 47th Federal Labor Relations Course (5F-F22).

5-9 June: 1st Intelligence Law Workshop (5F-F41).

5-9 June: 130th Senior Officers' Legal Orientation Course (5F-F1).

12-16 June: 25th Staff Judge Advocate Course (5F-F52).

19-30 June: JATT Team Training (5F-F57).

19-30 June: JAOAC (Phase II) (5F-F55).

5-7 July: Professional Recruiting Training Seminar.

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 6th Legal Administrators' Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys' Course (5F-F10).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers' Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 2d Federal Courts and Boards Litigation Course (5F-F14).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

April 1995

3-4, GWU: Procurement Ethics, Washington, D.C.

3-5, ESI: Continuous Improvement and Total Quality Management, London, England.

3-6, ESI: ADP/Telecommunications (FIP) Contracting, Washington, D.C.

4-7, ESI: Negotiation Strategies and Techniques, Orlando, FL.

4-7, ESI: Contract Accounting and Financial Management, Washington, D.C.

5-6, GWU: Contracting with Foreign Governments and International Organizations, Washington, D.C.

10-13, ESI: Contract Pricing, Washington, D.C.

10-14, GWU: Government Contract Law, Washington, D.C.

11-14, ESI: Procurement for Administrators, CORs, and COTRs, Washington, D.C.

17, ESI: Protests, Washington, D.C.

17-18, ESI: Award-Fee Contracting: The Creative Use of Incentives, Washington, D.C.

19-20, GWU: Best-Value Source Selection, Washington, D.C.

19-21, ESI: Changes, Claims, and Disputes, Washington, D.C.

20-21, ESI: Business Ethics in a New Era, Washington, D.C.

24-28, ESI: Federal Contracting Basics, Washington, D.C.

24-25, ESI: Terminations, Washington, D.C.

25-27, ESI: Contracting for Services, San Diego, CA.

25-28, GWU: Source Selection Workshop, Washington, D.C.

27-28, CLA: The 1995 Computer Law Update, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the September 1994 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer*.

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755	Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).
AD A265756	Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).
AD A265777	Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD A263082	Real Property Guide—Legal Assistance/ JA-261(93) (293 pgs).
AD A281240	Office Directory/JA-267(94) (95 pgs).
AD B164534	Notarial Guide/JA-268(92) (136 pgs).
AD A282033	Preventive Law/JA-276(94) (221 pgs).
AD A266077	Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).
AD A266177	Wills Guide/JA-262(93) (464 pgs).
AD A268007	Family Law Guide/JA 263(93) (589 pgs).
AD A280725	Office Administration Guide/JA 271(94) (248 pgs).
AD B156056	Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).
AD A269073	Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).
AD A283734	Consumer Law Guide/JA 265(94) (618 pgs).
AD A274370	Tax Information Series/JA 269(94) (129 pgs).
AD A276984	Deployment Guide/JA-272(94) (452 pgs).
AD A275507	Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.
*AD A285724	Federal Tort Claims Act/JA 241(93) (167 pgs).
AD A277440	Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A283503 Government Information Practices/JA-235(93) (322 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

*AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International and Operational Law

*AD A284967 Operational Law Handbook/JA 422(94) (273 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989) is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automated Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you

wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	*UPLOADED*	*DESCRIPTION*
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in Word Perfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1993	Law of Federal Employment, September 1993.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.

FILE NAME	UPLOADED	DESCRIPTION
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officer's Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.

FILE NAME	UPLOADED	DESCRIPTION
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one

5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SFC Tim Nugent, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)h, above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information may be of use to judge advocates in performing their duties:

> Ronald Turner, *A Look at Title VII's Regulatory Regime*, 16 W. NEW ENG. L. REV. 219 (1994).
>
> Note, *Constitutional Law—Developing Guidelines in Fourth Amendment "Clothing Cases" After* United States v. Butler, 16 W. NEW ENG. L. REV. 289 (1994).
>
> Note, *Constitutional Law*—People v. Griggs: *Illinois Ignores* Moran v. Burbine *to Expand a Suspect's* Miranda *Rights*, 16 W. NEW ENG. L. REV. 329 (1994).

6. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

> Office of the Staff Judge Advocate, HQ, United States Army Training Center & Fort Jackson, Fort Jackson, South Carolina, 29207-5045, Attn: Ms. Hall, commercial (803) 751-7844, DSN 734-7844, has the following material:
>
> • South Carolina Code (complete set)
>
> Office of the Staff Judge Advocate, HQ, United States Army Engineering Center & Fort Leonard Wood, Fort Leonard Wood, Missouri 65473-5000, Attn: CPT Henning, commerical (314) 596-0624, DSN: 581-0624, has the following material:
>
> • United States Supreme Court Reporter, L.Ed., vol. 111
>
> Office of the Staff Judge Advoate, HQ, First United States Army, Fort Meade, Maryland 20755-7900, Attn: MSG Terry Jackson, commerical: (404) 362-3345, DSN: 797-3345 has the following material:
>
> • Federal Reporter (complete set)
>
> • Maryland Code (complete set)
> • United States Supreme Court Reporter (complete set)
>
> • U.S.C.A. (complete set)
>
> • West Military Reporter and Digest (complete set)

Reduction in Slip Opinions

The new contract for slip opinions has been awarded. The number of opinions received by some offices has been reduced. Offices that receive one or two copies of the slip opinions (*eg.*, medical commands, military judges) will continue to receive the same number. Offices that receive more than two copies, however, will have the number reduced and will receive no more than two copies. One copy is for the SJA/CJA/OIC and one copy is for the local TDS office. Unless we have contacted your office, the number of advance sheets and military justice reporters have not been decreased.

The reduction in slip opinions resulted in significant savings for the ALLS budget. These savings will be used to purchase useful items for our libraries, such as CD-ROMs.

5½-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement that they need the requested publications for purposes related to their military practice of law.

g. Questions or requests on the availability of TJAGSA publications (other than JAGS 0PBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DPL, Charlottesville, VA 22903-1781. Telephone inquiries should be directed to (804) 972-6396 or DSN 274-7115, extension 396. Requests for JAGS-DPB publications should be in paragraph 6-3 format.

6. TJAGSA Publication Automation Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To provide information to contact TJAGSA or to obtain an e-mail address for someone at TJAGSA, a DDN user should send e-mail messages to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via facsimile should dial 804-972-6386 to get the TJAGSA secretary. Then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information on many be of use to judges researching or preparing their decisions:

Ronald Turner, *A Look at Title VII's Religious Accomodation Requirement*, 16 W. New Eng. L. Rev. 219 (1994).

Note, Constitutional Law—Double Jeopardy Clause Prohibits Second Prosecution "Conducting Continuing Criminal Enterprise" Under 18 U.S.C. § 848 Barred by Prior Conviction for Lesser Included Offenses: Grady v. Corbin, 110 S. Ct. 2084 (1990), 15 W. New Eng. L. Rev. 765 (1993).

Note, Constitutional Law—Double Jeopardy: Illinois Supreme Court Refuses to Bar Retrial Under Illinois Statute Following Reversal of Conviction Based on Insufficient Evidence: People v. Olivera, 557 N.E.2d 872 (Ill. 1990), 15 W. New Eng. L. Rev. 765 (1993).

6. The Library Loan Service

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. The Army Lawyer will continue to publish lists of law library materials made available as a result of base closures. Law librarians having library materials available for redistribution should contact Mrs. Helen Baer, Program Manager, Army Law Library Service, Office of The Judge Advocate General, Nassif Building, Room 1N301, 5611 Columbia Pike, Falls Church, VA 22041-3258, commercial telephone (703) 756-1237, DSN 289-1237, or facsimile (703) 756-1290. Requests for special services or projects should be addressed to her attention.

Law librarians having an requirement for withdrawn items listed in The Army Lawyer should send their requests to the Army Lawyer Distribution Office, Building 12800, Fort Lee, VA 23801-1705. Telephone requests are DSN: 687-3495, commercial (804) 734-3495, or facsimile (804) 734-4347. Requests must be received by the requested date to be honored.

The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

Office of the Staff Judge Advocate, HQ, United States Army Training Center & Fort Jackson, P.O. Box Jackson, South Carolina, 29207-5045 (Attn: MSG Hall) commercial (803) 751-7030, DSN 734-7030, for the following material:

- South Carolina Code (complete set)

Office of the Staff Judge Advocate, HQ, United States Army Signal Center & Fort Gordon, Attention: Janet Leonard Wood, Mission Room 4427-50, Building 29808, Chief Blvd, commercial (706) 791-6(DSN: 780-6021, for the following material:

- United States Supreme Court Reports, Lawyers' Ed., vol. 111

Office of the Staff Judge Advocate, HQ, United States Army Fort Hood, Fort Hood, Texas 76544-5200, Attn: MSG Terry Jackson, commercial (817) 287-3124, DSN 737-3124, for the following materials:

- Federal Reporter (complete set)
- Martindale Code (complete set)
- United States Supreme Court Reports (complete set)
- F.S.U.C.A. (complete set)
- West's Military Justice Reporter and Digest (complete set)

Solicitation in Ethics Opinions

The army contract ethics opinion has been revised. The number of opinions requested by some offices has been reduced. Offices in receipt of two copies of the ethics opinions (Reg. 27-1, Legal Services, Military Law) will continue to receive two copies each year. Offices that receive more than two copies, will have the number reduced and will receive no more than two copies. One copy to the SJA/CSA/OIC and one copy for the Legal Assistance Office. Unless you have requested your copies, the new Ethics Counselors and military justice reporters have not been established.

The reduction in ethics opinions resulted in significant savings for the ALLS budget. The savings will be used to purchase new titles for our libraries such as CD-ROM.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:

Distribution: Special

MILTON H. HAMILTON
Administrative Assistant to the
Secretary of the Army
07812

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The Judge Advocate General's School
US Army
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